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Law, Interpretation and Reality

*Essays in Epistemology,
Hermeneutics and Jurisprudence*

Edited by
Patrick Nerhot

Kluwer Academic Publishers

LAW, INTERPRETATION AND REALITY

ANDREW J. LEE

Abstract: This paper examines the relationship between law and reality, focusing on the role of interpretation in legal theory. It argues that law is not a fixed set of rules, but a dynamic system that evolves through the process of interpretation. The paper explores the challenges of legal interpretation and the role of the judiciary in shaping the law.

1. Introduction

The relationship between law and reality is a complex and often debated topic. At its core, the question is whether law is a set of objective rules that govern human behavior, or whether it is a social construct that is shaped by the values and beliefs of a community. This paper explores the role of interpretation in legal theory, arguing that law is not a fixed set of rules, but a dynamic system that evolves through the process of interpretation. The paper examines the challenges of legal interpretation and the role of the judiciary in shaping the law. It also discusses the importance of legal theory in understanding the relationship between law and reality. The paper is organized into three main sections: an introduction, a discussion of the challenges of legal interpretation, and a conclusion. The introduction sets out the main arguments of the paper and provides a brief overview of the topics to be discussed. The discussion of the challenges of legal interpretation explores the difficulties of interpreting legal texts and the role of the judiciary in shaping the law. The conclusion summarizes the main points of the paper and offers some thoughts on the future of legal theory.

Keywords: Law, Interpretation, Reality, Legal Theory, Judiciary

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PATRICK NERHOT

European University Institute, Florence



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INTRODUCTION

PATRICK NERHOT

Since the two operations overlap each other so much, speaking about fact and interpretation in legal science separately would undoubtedly be highly artificial. To speak about fact in law already brings in the operation we call interpretation. Equally, to speak about interpretation is to deal with the method of identifying reality and therefore, in large part, to enter the area of the question of fact. By way of example, Bernard Jackson's text, which we have placed in section II of the first part of this volume, could no doubt just as well have found a home in section I.

This work is aimed at analyzing this interpretation of the operation of identifying fact on the one hand and identifying the meaning of a text on the other. All philosophies of law recognize themselves in the analysis they propose for this interpretation, and we too shall seek in this volume to furnish a few elements of use for this analysis. We wish however to make it clear that our endeavour is addressed not only to legal philosophers: the nature of the interpretive act in legal science is a matter of interest to the legal practitioner too. He will find in these pages, we believe, elements that will serve him in reflection on his daily work. A broader public than lawyers may also be interested: in particular, historians, linguists, philosophers of the social sciences and those of the natural sciences, for the book also touches on epistemological and hermeneutic questions that go well beyond legal science alone.

These three introductory general considerations should bring out how much, in our opinion, the value of a philosophy of law ought to be measured by its capacity to guide the highly differentiated community of jurists in their daily proceedings, and by its capacity to respond to and enrich debates that may be taking place in the social or natural sciences. The texts we present by Monica den Boer and Bert van Roermund are an excellent illustration of this constant preoccupation.

The whole set of texts we present here came into being as part of the teaching and research we have been giving or directing at the EUI since the 1986 academic year; the texts in the first part are the result of individual thinking carried on in parallel with our teaching, while the whole second part is the outcome of research that led to the holding of a conference, and is therefore a more collective work. These clarifications as to the form are of importance in understanding some questions of substance.

Through the set of texts in the first part, what we have sought is diversity: diversity of theoretical models, expressed explicitly or implicitly in the conception that emerges from various conceptions or definitions of fact or of interpretation. It is our intention to show in this way that the widely accepted notion of fact in legal science (so well restored by William Wilson) is one particular conception of fact, and that many others exist (or might exist). The aim is thus to sow a few seeds of doubt in this field of strong certainties.

This conception of fact as something that goes without saying, as the very expression of the reality and truth of things, is opposed by other conceptions of reality and its interpretation. François Rigaux's text, and to some extent Michel Troper's, illustrate this. But however rich they may be in new constructions, these two articles do not approach the question of the paradigm of fact as the immediate, direct, unambiguous expression of reality. This is the path taken, modestly, by our own text. At bottom, we are seeking to bring to light a number of concealed foundations of positivist legal reasoning, starting from a critique of the paradigm of fact. This idea is certainly not very original in philosophy of science, for instance, but is so far little developed in the philosophy of law.

Diversity thus characterizes the whole of the first part, to show that the interpretation of reality dictated by this paradigm of fact (William Wilson), may be opposed by other interpretations (and to some extent, too, other conceptions of reality put forward) to the extent that the paradigm of fact is rethought (Patrick Nerhot).

From the whole set of thoughts in these texts the idea emerges that any perception of reality has a normative origin that determines it, qualifies this reality and gives it a meaning. This was what gave birth to the hypothesis in our research (part II): If a fact acquires a meaning, or what comes to the same thing, comes into being, on the basis of a normative source (for our purposes here, a text, some rule or other), then how is the meaning of this normative source to be determined? It is clearly only once this question has been answered that the first phenomenon can be understood.

Thus, the very form of the first part expresses the objective aimed at, namely the breaking down of this belief in fact. In this sense, the form is

inseparable from the substance, just as the form of the second part likewise reflects the goal pursued. We have put forward a hypothesis (that of narrative coherence) to describe the rationality of legal reasoning. This hypothesis was explored by a group of researchers (linguists, philosophers, legal theoreticians) and at a single conference. Here, then, it was rather unity than diversity that was sought.

But let us for the moment, and for as long as is possible, leave the interpretive act on one side and stay with the problem of fact (we would, for instance, refer to what Georges Farjat says in his *Traité de droit économique* - Presses universitaires de France, 2nd edition, 1982 - which proclaims the impossibility of defining (economic) facts because we do not yet know the true (economic) rules for a number of (economic) phenomena).

This fundamental distinction posited by legal science between fact and law allows the whole set of actions, or social practices, that on one basis or another come under the heading of law to be arranged abstractly on the basis of a relatively simple principle of separation. That is why we call fact a paradigm, in the sense used by the philosopher of science, Thomas Kuhn, in his latest work (*The Essential Tension*, U. of Chicago Press, 1977).

This separation acts in order to:

- identify law itself as an object (there is the world of law and the world outside law: the hermeneutic approach proposed by L. Gianformaggio in the second part of the volume is entirely characteristic of this);
- arrange this object in rationality (the distinction between legal fact and legal act);
- set fixed reference points for techniques of exercise of power (separation of powers, sovereign legislator, judge as servant of the law);
- identify the very principles for the rationality of what a legal science ought to be (1. competence of lower jurisdictions: questions of fact, questions of law; competence of supreme courts: questions of law; 2. principle(s) of the distinction between what is fact and what is law). All these methodological postulates come together in the construction of a legal science, and clearly the problems met with are at the level of the goal pursued.

W. Wilson (who in this work symbolically represents dogmatics) himself tells us that the distinction between law and fact is not always obvious in common law (we would say, and with good reason, not only in common law) and it is ultimately for a judge to say what is fact and what is law (which is equally not exclusively characteristic of the common law judge). The surprise that may be felt by traditional dogmatics when it sometimes stumbles upon the distinction between facts and law is all the more marked because its use of its methods has become largely automatic and mechanical, and because it has for decades abandoned all thinking about the interpretation

of reality and about the very nature of its method. Yet the idea of a multiple reality, the treatment of which ultimately rests on the shoulders of the interpreter, nevertheless emerges and imperceptibly there is a sliding from fact to interpretation.

This is indeed the real problem (of which the distinction between pure questions of fact and pure questions of law is an imperfect attempt at solution): How can the law claim to govern "reality" (events, situations other than everyday ones), how in doing so does it define it and describe it (create it, to some extent)? In legal studies the idea must absolutely be abandoned that there is reality on one side (i.e. the social world) and law on another. The idea we have of law and its substantiality is thus much too deeply embedded in our social world for such an epistemological cut to be acceptable.

There are events that have a share in reality (including rules, decisions, legal practices), there are events that are meanings that an interpreter, authorized or not, gives these rules or these judicial decisions and there are events which will be defined - and therefore in part created - by legal rules. We know very well that the interpretive act consists in both creation of reality - "subject" of law - and creation of the meaning of the rule of law - "object" of law. This is what an epistemology of law has to cope with.

In order both to emphasize and to criticize what positive philosophy concealed behind the notion of fact, Bachelard (*La psychanalyse du feu*, Idées, NRF, 1949) used the marvellous formula: "primary observation is not a fundamental truth". The whole question consists of conceiving of the *mediation* organized by 'primary observation'. This is just the aim of our hypothesis of narrative coherence (aimed at opposing the so-called correspondence theory), and we come increasingly to understand why the question of fact is inseparable from the question of interpretation. Denying this interpretation, to which we alluded at the outset, amounts ultimately to denying this mediation: a denial that would today be inconceivable in natural or social science. Francois Rigaux is right when he says that all fact is liable to come under law: "however many descriptions, that many facts". We have approached this mediation through the notion of fact; let us now approach it from the angle of interpretation, through the two texts presented by Aulis Aarnio and Bernard Jackson.

For Aarnio's texts, which are an aspect of common language, contain all the difficulties typical of any language, and the question to be resolved will therefore be that of the acceptable meaning and its elaboration. One thesis, though implicit, predominates: texts are objects of analysis outside the interpretive discourse itself. The interpreter uncovers a plurality of meanings,

among which he must choose, and he must convince the community of jurists that his choice is pertinent.

Conversely, for Jackson 'the law' is not an object outside a discourse that names it; it is constructed in the forms of discourse, and constitutes an element in the system of communication that renders that discourse comprehensible. Thus, just as much as, for Aarnio (and we understand why), it is inappropriate to distinguish between the judge and the jurisconsult (since the difference can be assessed only on the basis of their respective roles), so for Jackson the distinction will be central, and these different forms of legal discourse (by the jurisconsult, by the practising advocate, by the practising judge, by any auxiliary of justice, etc.) will, in linguistic terms, correspond to many different legal systems. Aarnio's new dogmatics bears within it an implicit linguistic theory, while for Jackson linguistics becomes the fundamental theoretical foundation for knowing law as an object.

Yet these two approaches, so different in method followed and metatheoretical choices made, nevertheless come together on the question of the foundation of law. Jackson proposes the model of the story as the foundation of law ('rules are linguistic expressions of narrative models'). Aarnio proposes the concept of consensus: legal scholarship must seek to offer a legal interpretation that can make possible the support of a majority of individuals in a legal community that argues rationally (here we recognize the theses of Jürgen Habermas, analyzed by Jacques Lenoble in the second part of this volume). But these two approaches define law as an interpretive process, as argumentation: it must convince, and logic will be only one resource among others.

Arthur Kaufman gives us elements which according to him are essential to this act of persuasion, starting from what has been called the 'new' philosophy of natural law. Right from the opening lines, the author supplies us with what we call the 'plot' of any legal interpretation (our article, part II). Just as Norberto Bobbio aimed at limiting the use of analogy in legal science (*L'analogia nella logica del diritto* - Turin, 1938) in order to oppose the improper interpretation by Italian Fascist jurists of the Italian republican laws, so in this article Kaufman sets conditions - interpretive rules, in our understanding - that should prevent any slide from a state based on the rule of law into a totalitarian state. In doing so, the author has to cover the whole range of problems facing the philosopher of law, and it is no less remarkable that he does so with a single gesture. He thus deals successively with the questions of legal reality and its statement, with the nature of law (law as relation), with the foundation of the interpretive act,

with legal ontology, to conclude with a definition of law itself: "(it is) an idea about the nature of man, otherwise it is nothing".

The plot - we mean that which makes the interpretation come about - is constructed by this philosophy: reality will be perceived through this *contemplation*, the texts will *take on meaning* on the basis of this definition, and legal technique in general will become comprehensible only within this overall philosophical design and will be entirely at its service.

These three philosophies of law, these three interpretative theories - 'new dogmatics', legal semiology, new natural law - which we deliberately selected as different, all lead to the same conclusion: that when it comes to interpretation, there is no *single* right answer. They thus oblige us to ask ourselves about the very nature of rationality and the interpretive act. This brings us to the second part of our work: very different, as we said, from the first in form. Here we have not sought diversity but instead subjected a single hypothesis to analysis. We are however - and this can be understood on the basis of the authors' total freedom - far from presenting unanimous thoughts: take, for instance, our text with Zaccaria's, or Jackson's with Peczenik's, etc.

What our work is expressing here, through this hypothesis of narrative coherence, is the present state of the debate within legal philosophy: the theory of coherence is gaining ground at the expense of the theory of correspondence, the concept of 'consensus' is advancing, and the trouble philosophy of science is having with the impossibility for science to state reality is extending to the area of legal epistemology and hermeneutics. The contributions by Vittorio Villa, Bert van Roermund, Jacques Lenoble, etc., bring this out clearly. The latter in particular reminds us that the two philosophical models of narrativity (Paul Ricœur, Hanna Arendt), have a common origin (Kant's third critique) and that they feed from the same source as the contemporary renewal of political philosophy (Jürgen Habermas, Hanna Arendt). The contributions by Aarnio and Peczenik are undoubtedly a good illustration of what Lenoble is saying.

But with Heinz Karl Ladeur we can see that these 'new' tendencies were born at the turn of the century. He shows us how, progressively, the concept of reality was made to dissolve (Heck, Kelsen, Weber). This author's thesis, which was also the principle of our October workshop, is perhaps a good example. It is that the theory of law has to deal with a fairly indeterminate reality, increasingly differentiated, and states that integrating the concept of reality is the task of law, of legal theory. Law is increasingly perceived as a process, reality as increasingly fleeting and ungraspable (Niklas Luhmann's metaphorical re-use of the interpretive model outlined in biology by

Humberto Maturana and Francisco Vasela is thoroughly typical of this). Bert van Roermund's work also comes in to support this thesis.

This tendency came about to the detriment of the positive philosophy which with little opposition presided over the century, symbolized by the 'Vienna Circle', and which had so much impact on legal epistemology itself.* The tendency is making way only very slowly, and is perhaps today concealing a new formation of the relationship between theories of coherence and theories of correspondence. Perhaps the articles we present here allow this to be seen.

What nevertheless prevail here, hardly surprisingly given the hypothesis put forward, are coherence theories, even if the articles are on the whole far from agreeing on the meaning these theories might have in application to the interpretive act. Thus our paper develops the thesis of an identity between historical methodology and legal methodology, by asserting that it is inappropriate to distinguish between codified law and non-codified law, while Giuseppe Zaccaria's thesis tends firstly to deny any such identity and secondly to maintain the principle of the distinction (it is true that as sources we draw largely on Gadamer and he on Betti!). Zenon Bankowski supports our position by working on the idea that the members of a court have no immediate access to truth of things for the members of a court, and showing that they have no access to any truth at all except through procedures, which therefore constitute not a truth in itself but a truth that confirms a procedure. This position is again strengthened by the work of Monica den Boer, which shows how, in criminal proceedings, the criminal intent is practically reconstructed by the legal account - made up of fragments of the situation, as the author clarifies - that the administration of legal evidence amounts to. These papers, like van Roermund's, are liable to interest practitioners of law, and perfectly express the link we referred to at the outset of this introduction between legal philosophy and legal practice.

A common thesis on narrative coherence in the interpretive act in law thus seems to emerge from a reading of some contributions to the workshop; we find this thesis again in Jackson's second paper. Starting from the legal syllogism, he recalls that the object of the legal reasoning that uses this form is for the major premise to be able to refer to the minor premise in the 'facts' that the latter contains. The major premise would be more or less a language that denotes without referring to anything whatever, and the

* For all this, cf. the work by Vittorio Villa: *Teorie della scienza giuridica e teorie delle scienze naturali, Modelli ed analogie*, Milan, Giuffrè, 1984, translated into French by Patrick Nerhot, Economica, forthcoming.

minor premise would be one that incorporates references. But as Jackson tells us, the real problem is to know why a court chooses to refer to *this* situation as being the 'denotatum' of the major premise (see also our paper on law and reality). This question, the author goes on, compels us to adopt the theory of coherence and reject the theory of correspondence. The syllogism would then be a set of accounts whose relevance results from likelihood and not from identity; the major premise would express the understanding we have of general rules - derived from unconscious narrative models (once again, see our 'Law and Reality') - and constituting representations of types of action. The minor premise is a competition between possible competing accounts. Narrative coherence thus describes the relationship that exists between the implicit account in the major premise and the explicit account in the minor premise. Jackson thus definitively rejects the theory of correspondence, and comes very close to our own idea.

But, blessed be, Letizia Gianformaggio comes along to disturb this hint of unanimity and, even if she does adopt the distinction proposed by Jackson between judge and lawyer other than judge, goes on to depart quite considerably from him. By distinguishing the world of law and the world of the text, the two aspects of the legal syllogism in her view, Gianformaggio maintains the idea that this minor premise of the syllogism sets up a correspondence with facts (some things the author says bring us back to Wilson's paper), while stating that it cannot be justified as such, because 'the world has no meaning'. The major premise, on the contrary, which does not correspond to facts but is a general interpretive act, quite clearly must contain one. In our own article we have posited the impossibility for an interpretive act to distinguish between the world of law and the social world.

We have left to Vittorio Villa the task of concluding the volume; the nature of his work suggested that, since he shows us the epistemological presuppositions of the legal philosophies of Aulis Aarnio, Ronald Dworkin, and Neil MacCormick (we might, by the way, extend some other theses that Villa puts forward in connection with Aarnio's work to Peczenik's work). His general line of argumentation consists in showing the resemblances between 'post-empirical constructivism' and the 'constructivist model', through the study of the methodological theses of post-constructivist theories and the epistemological postulates of such legal theoreticians as Neil MacCormick. All along, there imperceptibly emerge the questions that tomorrow will dominate the main lines of research in legal theory. All grist to the mill of legal theory.

Finally let us give special thanks to Sandra Brière for the assistance she has given in editing this work, and to Iain Fraser for all his translations.

PART 1

THE LAW AND ITS REALITY

SECTION I: LEGAL ASPECT OF "REALITY"

FACT AND LAW

WILLIAM WILSON

This discussion of the problems of distinguishing between questions of fact and questions of law starts from the point of view of the practical lawyer.¹ In legal practice the distinction between fact and law arises in several ways. In Scottish pleading one part of the writ which initiates an action contains a statement of the facts on which the pursuer (plaintiff) relies while another part contains the propositions of law upon which he relies. In English criminal procedure there is an important distinction between matters of law which must be decided by the judge and the matters of fact which must be left to the jury. In the United Kingdom many appeals, particularly in the areas of administrative law and taxation, are restricted to questions of law and there is no appeal on questions of fact. Of course, practical lawyers often take a cynical approach to this distinction and say that if the judge wants to interfere with an administrative decision he will say that it involves a question of law whereas if he thinks the decision is right he will say that it involves a matter of fact and that he cannot interfere with it. However, the theorist must try to make the distinction as best he can.

The discussion is confined to statute law. The normal form of a statutory provision is that a set of conditions is stated and if these are satisfied a certain legal result follows. For example, the Sexual Offences Act 1956, s.30, provides, "It is an offence for a man knowingly to live wholly or in part on the earnings of prostitution." That can be reduced to the form - If (1) Z lived wholly or in part on the earnings of prostitution, (2) Z did so

¹ On fact and law generally, see Glanville Williams (1976) *Crim. L.R.* 472; Berkovits (1981) *J.S.W.L.* 83; Mureinik (1982) 98 *L.Q.R.* 587; Jackson in *Facts in Law* (ed. Twining) (1983) *Archiv für Rechts- und Sozialphilosophie* Bhft. 16, p. 85; Flick (1983) 15 *U.W.A.L. Rev.* 193; Beston (1984) 4 *Oxford Jou. of Legal Stud.* 22; Pitt (1985) 101 *L.Q.R.* 217.

knowingly, (3) Z was a man, then Z was guilty of an offence. There is of course a wide variety of possible legal results - there are crimes, liabilities, liberties, the creation of status and so on.

The legal process takes the form of one party putting before the court the evidence, oral or written, which justifies a finding that each of the conditions is established. If each condition is satisfied the court then finds that the legal result must follow.

Suppose that the case before the court is "If Smith killed Brown's cow, Smith must pay Brown the value of the cow". If Brown brings two witnesses who say that they saw Smith killing Brown's cow then the only question the court has to decide is whether the witnesses are telling the truth or not. I call this a "truth question". A judge or jury decides whether the witness is telling the truth by observing his demeanour in the witness box. The flickering of his eyelids or the beads of perspiration on his forehead may indicate that he is not telling the truth. Of course, it is not only credibility that must be considered; there is also reliability. Can the witness observe properly? Is his memory good? And so on. However, if the witnesses merely say that they saw Smith holding an axe dripping with blood and the cow was lying dead at his feet, the court has to decide first whether the witnesses are telling the truth and secondly whether the truth of the condition can be inferred from the matters established. I call this a "probability question". This, of course, is proof by circumstantial evidence. The truth of the condition is inferred from the matters which have been observed by the witnesses. The inference is a matter of probability because if F, G and H are being used to prove B, it is possible that F, G, and H are true and that B is not true.

The third possibility is that the court or the other party in cross-examination may inquire more deeply into the matter by requiring the witnesses to give a more detailed account of what happened, "How did Smith kill the cow?", "Where and when did it happen?" and so on. If they say they saw Smith shoot the cow through the head with a rifle on 16th August 1986 at 5 p.m. in the main street of Fiesole the court may be satisfied but still further details or specification may be required. Can the process ever come to an end? Probably it does come to an end when everything is reduced to figures; when the lengths and weights and other characteristics of everything have been measured there may not be anything more that can be asked about. Figures will be discussed again. Suppose that when the witnesses are asked how Smith killed the cow they say that they saw Smith standing in a field with his umbrella held behind his back and they saw the cow move behind him and impale itself through its heart on the tip of his umbrella. No torador he. The short question which then arises is whether the court is

justified in affirming that Smith killed the cow. This type of question is quite common. Does a finding that something was a sheep justify a finding that it was "cattle"? Is a bicycle a "carriage"? Is pushing a car while having both feet on the road and one hand on the steering wheel "driving" the car? Is a car with a roller skate under each wheel "on the road"? These questions arise mainly from the open texture of language and I call them "description" questions.

Before proceeding further, it may be helpful to give some illustrations of description questions showing that they can relate to different parts of speech and showing how they are answered by the courts.

(A) *Nouns*

"It is an offence for a man knowingly to live wholly or in part on the earnings of prostitution".²

That is,

(1) "Z lived, wholly or in part, on the earnings of prostitution."

(2) "Z did so knowingly."

(3) "Z was a man."

(i) Z was born a man;

(ii) Z was biologically a man;

(iii) Z had under a "sex-change" operation consisting in the removal of the external male organs and the creation of an artificial vaginal pocket.

Proposition (3) affirmed.³

(B) *Passive Verb*

"the wine W was *produced* in the United Kingdom"

(i) wine of less than 15 per cent strength was imported;

(ii) wine of strength between 18 and 22 per cent was imported;

(iii) the two wines were blended in the United Kingdom to produce the wine which was of between 15% and 18% strength.

The House of Lords held that the proposition was not established.⁴ "I have no doubt whatever that when wine is "obtained" from the alcoholic fermentation of grapes, it is "produced", and that wine is not again

² Sexual Offences Act 1956, s.30.

³ *Regina v Tan* (1983) Q.B. 1053. See also *Corbett v. Corbett* (1971) p. 83.

⁴ *Cinzano (U.K.) Ltd. v Customs and Excise Commissioner* (1985) 1 W.L.R. 484, per Lord Brightman at p. 488.

“produced” because two wines previously obtained are then blended into a single wine.” The pattern of the legislation was that mutually exclusive paragraphs dealt with imported wine and home “produced” wine just as similar pairs of paragraphs dealt with imported and “distilled” spirits, imported and “brewed” beer and imported and “made” ciders.

(C) *Active Verb*

“Z *wounded* W”

- (i) Z fired an air-gun at W;
- (ii) the pellet hit W in the area of the left eye;
- (iii) some blood vessels inside the eye were ruptured;

Negated.⁵ On the authorities, for there to be a wound, there must be a break in the continuity of the whole skin.

(D) *Adjective*

“Z’s requirement was *medical*.”

- (i) Z’s requirement was osteopathic treatment.

Affirmed⁶ -“clear beyond argument at the present day.”

(E) *Adverb*

“Z *openly* exposed his person”

- (i) Z exposed his person to his landlady in his rented room.

Affirmed.⁷

(F) *Preposition*

“The vehicle was *on* the road”

- (i) The vehicle was in the road with a roller skate under each wheel so that the wheels were not in contact with the road surface.

Affirmed⁸ -“perfectly clear.” The argument to the contrary, taken to its logical extent would mean that a piece of newspaper under each wheel would produce the same result.

⁵ *C. v Eisenhower* (1984) Q.B. 331.

⁶ *Regina v Peterborough Supplementary Benefits Appeal Tribunals, ex parte Supplementary Benefits Commissioner* (1973) 3 All E.R. 887.

⁷ *Ford v Falcone* (1971) 1 W.L.R. 809.

⁸ *Holiday v Henry* (1974) R.T.R. 101.

(G) *Phrases*

"The S.S. Kenuta was *on the high seas* "

(i) the ship was in the port of Nassau.

Affirmed.⁹ The draftsman of the Act (Merchant Shipping Act 1894) must have known the meaning attached to the expression "high seas" by prior decisions in which it was given the meaning "Anywhere where the great ships can go". There was no reason for not using that meaning and it was convenient to use it.

"The place where the harmful event occurred was *in the Netherlands*"

(i) Salts were discharged into the Rhine in France;

(ii) the pollution resulting therefrom damaged plantations in the Netherlands.

Affirmed by the European Court of Justice.¹⁰ The expression covers both places. Both the place where the event giving rise to the damage and the place where the damage occurred are significant connecting factors and it is not appropriate to exclude either since each can be helpful in relation to evidence and procedure. Some national laws of member-states accept both factors concurrently.

Thus there are three types of question identified - truth questions, probability questions and description questions.

The distinction between probability questions and description questions is neatly illustrated by two "breathalyser" decisions. It was a requirement of the the breathalyser legislation that the request for a breath specimen should be made by a "constable in uniform". In one case the magistrates found that the constable making the request had not said in evidence that he had been in uniform. It was held that the magistrates could infer that he was in uniform from his statement that he was a special constable on duty and the known fact that the special constabulary had no plain clothes department.¹¹ That was a probability inference. In another case the evidence was clear that the constable was in uniform except that his helmet was not on. It was held that he was, nevertheless, "in uniform."¹² In the same way in another case, it

⁹ *Regina v Liverpool Justices ex parte Molyneux* (1972) 2 Q.B. 384.

¹⁰ *Handelskwekerij Bier v Mines de Potasse* (1978) 1 Q.B. 708.

¹¹ *Richards v West* (1980) R.T.R. 215.

¹² *Wallwork v Giles* (1970) R.T.R. 117.

was indicated that a constable wearing a nylon raincoat over his normal uniform might nevertheless be "in uniform."¹³ These were description questions.

It has to be conceded that a probability question can merge into a description question. Suppose the Cheshire cat in Alice in Wonderland instead of vanishing slowly had appeared slowly; if the grin appeared first that would not have been evidence of the presence of a cat but there would have come a point at which enough features had appeared to justify a probability inference that this was a cat; when three legs and a body had become visible it could be said that this was a cat and not merely evidence of the presence of a cat.

Then there is the speed trap problem. Suppose it is established that Smith drove past point P at 10 a.m., that he passed point Q at 10.05 p.m. and that P and Q are four miles apart. The question is was he driving at 48 miles per hour. The answer is "yes" and that is a necessary inference not a mere matter of probability. British lawyers are never sure whether to classify the speedtrap as circumstantial evidence.

It has been said that the British system of cross-examination does force the witness to reduce his evidence to matters of greater detail. British judges have drawn a distinction between the ultimate statements of the witness which might be called primary facts and the inferences which the court makes from these primary facts which are called secondary facts.¹⁴ Reference is also made to "matters of opinion", but matters of opinion seem to be secondary facts.¹⁵

It might be thought that what witnesses say is always under the heading of primary fact. It has, however, to be conceded that there are some "ancillary" witnesses who help the judge to answer questions. A psychiatrist witness may advise the judge as to whether a witness is likely to be telling the truth¹⁶ (truth questions). Statisticians say what the chances of a certain event happening were (probability questions). Trade experts depone as to the

¹³ *Taylor v Baldwin* (1976).

¹⁴ *British Launderers' Research Association v Hendon Rating Authority* (1949) 1 K.B. 462 at p. 471.

¹⁵ *Luke v Minister of Housing and Local Government* (1968) 1 Q.B. 172.

¹⁶ *Regina v Toohey* (1965) A.C. 595.

meaning of technical terms used in the statutes such as “fettling” “crawling boards.”¹⁷

Mathematicians opine as to whether in the words of a statute, “the gaming is so conducted that the chances therein are equally favourable to all the players”¹⁸ (description questions).

Judges answer description questions in several ways. If the question is of the form “Is this X a Y?” where X is the description of the witness and Y is the statutory expression, the judge may say, “Yes, because all Xs are Ys”, e.g., insulin is a “drug” and a bicycle is a “carriage”. Alternatively, the judge may say that the answer is “No, because no X is a Y”, e.g. rabbits are not “cattle”. I call these inferences “A inferences”. Alternatively, the judge may say, “This X is not a Y because it lacks an essential attribute of a Y”, e.g., a space surrounded by roof on three sides only is not an “opening in a roof” which must be surrounded by roof on four sides. A carriage cannot be said to be plying for hire unless it is being exhibited to the public. This is a “B inference”. The third approach of the judge is to look at the detailed description of the Xs and to say, “All the essential attributes of a Y are here, this must be a Y.” I call this a “C inference”. Very often a C inference results from a B inference manqué. A “loudspeaker” is not limited to an apparatus which reproduces speech - loudspeakers in London railway stations broadcast speech and music. A pipe which conveys the surface drainage of buildings is a “public sewer” even though it also absorbs drainage from several miles of road. A road-worthy attachment to a motor bicycle is a “side-car” even though it is not constructed for the carriage of a passenger. Lastly, the judge may feel that he cannot use a universal proposition of this kind, or any of these kinds. He may then say, “Whether *this* X is a Y is a question of degree depending on the attributes of the X”. Whether a “nest” of prostitutes is a “brothel” depends on the closeness of the rooms to each other, the nature of the lettings and other circumstances. Whether a contribution to a society is “voluntary” is a matter of degree - “advantages obtained being weighed against the value of the subscription paid and possibly, the responsibilities undertaken”. I call this a “D inference”. In *Fav v Fav*¹⁹ Lord Scarman drew a distinction between “inference” (“a process of reaching a finding of one fact” (or set of facts)) and “assessment” which is

¹⁷ *Jenner v Allen West & Co. Ltd.* (1959) 1 W.L.R. 554.

¹⁸ Downton, *The Statistician*, Vol. 26, p. 163.

¹⁹ (1982) A.C. 835, at p. 842.

used in deciding matters of degree. In some cases, it is represented as a balancing process. Lord Bridge in discussing the application of "fair and reasonable" said:

"the court must entertain a whole range of considerations, put them in the scales on one side or the other and decide at the end of the day on which side the balance comes down."²⁰

Questions of degree occur fairly frequently. Is a certain part of the rent of a house a "substantial portion of the whole rent"? Is a car with an incomplete engine and batteries missing a "mechanically propelled vehicle"? Is a do-it-yourself furniture kit "furniture"?

An attempt will now be made to classify inferences and questions as fact or law. The obvious cases can be dealt with first. It seems to be appropriate to call truth questions and probability questions questions of fact. One can answer them without knowing anything about law. Then there are questions which are obviously questions of law which arise in formulating the set of conditions into which a statutory provision can be resolved. For example, if the statute uses the phrase "fixed plant or machinery" there is a question as to whether this means "fixed plant or fixed machinery" or "fixed plant on the one hand, or machinery, fixed or unfixed" on the other. A similar problem arises from the form "No X of a Y or a Z shall be...". Does the prohibition extend to a Z as well as an X of Y or only to an X of Z and an X of Y? Where the wording was "No officers or servant of a county agricultural executive committee, or any sub-committee or district committee thereof shall be appointed to receive representations", Lord Goddard C.J., held that sub-committees were barred but the Court of Appeal thought that "of" should be implied before "any".²¹ The resolution of these syntactic ambiguities is obviously a question of law.

Statements have their difficulties. One might say that "The accused is a man" is obviously a statement of fact, but there can be a question of interpretation involved here which might be a question of law. Then there are statements such as "Jim is married to Mary" or "That document is a contract of hire" or "He has committed a delict". These statements include legal concepts and one is not at all sure that they can be said to be statements of fact.

²⁰ *George Mitchell (Chesterhall) Ltd. v Finney Lock Seeds Ltd.* (1983) 2 A.C. 803 at p. 816.

²¹ *Reg. v Minister of Agriculture* (1955) 2 Q.B. 140.

Other types of statement have to be borne in mind. "He will suffer from arthritis in the heel in ten years" time" seems to be a future fact. "If he had been given a safety belt he would not have worn it" seems to be a matter of hypothetical fact. And then there are mental facts, e.g. "He thought his wife was pregnant".

In the United Kingdom the main dispute about fact and law has arisen in relation to description questions. Some judges think that if all the primary facts are found the only question left must be one of law. "Where all the material facts are fully found and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only."²² On that view all description questions are questions of law. "It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved."²³ On that view it is always fact.

It is better to deal first with inferences rather than questions. The inferences A, B and C used to answer description questions would seem to fall into the category of inferences of law. They are not concerned with the outside world. They are concerned with what parliament intended. They do not involve exclusively linguistic considerations; other factors are considered. For example, in the Administration of Estates Act 1925, section 55 (1), which defines the "personal chattels" of a deceased, the definition includes "horses" which clearly covers horses used for domestic purposes but there was a dispute as to whether it applied to twelve race horses used for recreation.²⁴ Similarly, the definition included furniture. A litigation arose as to a deceased's collection of clocks valued at £51,000.²⁵ In these cases the linguistic answer was clear but the intention of the legislature had to be taken into account. It will be observed that a description question tends to arise when it is suggested that more than one factor or dimension is involved in the application of a word. In the examples just given the question arises because it was suggested that in applying "chattel" not only the nature of the

²² Lord Parker, *Farmer v Cotton's Trs.* (1915) 6 T.C. 590 at p. 600.

²³ Lord Reid, *Cozens v Brutus* (1973) A.C. 854, at p. 861.

²⁴ *Re Hutchinson* (1955) Ch. 255.

²⁵ *Re Crispin's Will Trusts* (1975) Ch. 245.

item was relevant but also the way in which it was being used. Judges often make emphatic statements that a word is not to be analyzed in terms of factors or dimensions. "'Cruel' means 'cruel'."²⁶ "'Knowingly' means 'knowingly'."²⁷ "'A sea-going ship' means a ship which does go to sea."²⁸ They are trying to make the application of the word a question of fact.

The real problem arises in regard to D inferences. There is a strong view among the judiciary that matters of degree and circumstances are treated as questions of fact. It is not possible to say that in all cases of the application of a particular word a particular type of inference will be used. In the case of any particular word, an A, B, or C inference on the one hand or a D inference on the other may be used, so that it is not possible to say that "Whether an X is a Y" is a question of fact (or law).

Numbers seem to be in a special position. It is not very common in U.K. statutes to find that a particular result follows from some measurement being of a specified level expressed in numbers. Normally the result applies if something is below or above a certain level. But if one goes back far enough to the window tax, one finds a provision of the kind "if a house has four windows it will pay tax of £100". Now, if one considers what sort of statements can be adduced to support the condition there, it is clear that once one has established what a window is, i.e., that bay windows and oriel windows and skylights are all disposed of one way or another, then it is difficult to see how any description question can arise. The statements of the witnesses as to the number of windows, once accepted, settle the matter. There may be a certain calculation required, addition or multiplication, but once it has been established what are windows there is no room for speculation or doubt or argument as to the number. Of course, in the case of some measurements where there are estimates, there may be a probability question but there is no description question.

Lastly, I come to the nature of a question of degree and consider some of the attributes of a matter which is decided by a D inference. The differences between matters of law and matters of degree seem to be the following:

(1) It is sometimes said that a matter of law provides a rule which can be used in future cases and that seems to be true of A, B, and C inferences. The assumption is often made that the question of degree is settled only for the

²⁶ *Le Brocq v Le Brocq* (1964) 1 W.L.R. 1085, *per* Harman L.J. at p. 1089.

²⁷ *Vane v Yiannopoulos* (1965) A.C. 486, *per* Lord Donovan at p. 512.

²⁸ *Salt Union Ltd. v Wood* (1893) 1 Q.B. 370.

particular case but in principle the answer to a question of degree should be used to answer the question in precisely the same set of findings is presented again. It is, of course, extremely unlikely that the same set of findings will be presented again. The other point that prevents the use of the degree question as a precedent is that very often the findings do not record the situation with sufficient accuracy to make it certain these two cases are the same. One is tempted to suggest that a D inference determines class membership while A, B and C inferences determine class inclusion but there are difficulties about this.

(2) The second characteristic of the matter of degree is that it is recognized that it can be "correctly decided either way". "Reasonable people with the same facts may reasonably come to different conclusions, and often do. Juries do. So do judges. And are they not all reasonable men?"²⁹ "There must be a borderline or twilight area in which a conclusion one way or the other could easily be reached."³⁰ "Indeed, in many cases, it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons."³¹ "Lord Diplock ... referred to cases where the dividing line might be a very narrow one. There are many cases where the dividing line is pretty well Euclid's line, having no thickness of any description at all, and one might easily come down just either side of the line."³²

(3) Matters of degree have a quantitative element whereas matters of law are decided on a qualitative basis. It is often said that in matters of degree the word has no essential attributes although it is not certain that that is right. However, what is clear is that there are interchangeable factors in matters of degree. A deficiency in the quantity of one factor can be compensated for by a surplus in another. Not every factor needs to be present in some degree in each case.

Questions of degree seem to be *sui generis*.

²⁹ Lord Denning, *Griffiths v J.P. Harrison (Watford) Ltd.* (1963) A.C. 1 at p. 19.

³⁰ Viscount Simonds, *Sun Life Assurance Society v Davidson* (1957) 37 T.C. 330 at p. 354.

³¹ Sir Wilfred Greene, M.R. *C.I.R. v British Salmson Aero Engineers Ltd.* (1938) 2 K.B. 482 at p. 498.

³² Watton J., *Bird v Martland* (1982) S.T.C. 603 at p. 608.

THE FACT AND THE LAW*

MICHEL TROPER

Fact and law are two concepts that are habitually opposed to each other. Thus, the judge deals with questions of fact and questions of law separately; the administrator with legality and then with advisability, the scientist with what ought to happen or what actually does. This opposition is sometimes presented as a logical distinction, sometimes as an ontological distinction between *Sein* and *Sollen*.

Nevertheless, however clearly and rigorously the opposition may be conceived, it is never so absolute that every type of relationship between them can be denied. Even such an author as Kelsen accepted this minimum relationship; it is always possible for the facts to be the way they should be, i.e. for a *Sein* to "correspond", to conform with a *Sollen*.¹ Likewise, in the legal order, facts have no existence and cannot be stated independently of or at the side of the law: they must be apprehended by law in their material existence in order to be given a legal description, or in the case of a non-contentious decision, assessed.

There is a similar problem for a metatheory of law: if law and fact are opposed, if argumentation is carried on, as is most often the case, within the framework of a classification of sciences into formal and empirical sciences, then the science of law, which cannot for various reasons be regarded as a formal science, cannot be classified among empirical sciences either, since it does not relate to facts.² In these conditions, how can it still be a science

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¹ Hans Kelsen, *Allgemeine Theorie der Normen*, Vienna, Manzsche Verlags- und Universitätsbuchhandlung, 1979, pp. 4-6, 24-33, 46-48, (from now on cited as ATN).

² Norberto Bobbio, *Teoria della scienza giuridica*, Turin, 1950; see Vittorio Villa, *Teorie della scienza giuridica e teorie delle scienze naturali*, Milan, Giuffrè, 1984: The opposition

that describes its subject using true propositions, and what does the truth of those propositions mean?

From another viewpoint, if the attempt is made to make legal science into an empirical science, two considerable difficulties will have to be faced: an empirical object, or at least one capable of being apprehended as an empirical fact, will have to be discovered; and the fate of the opposition between fact and law will then have to be examined.

I propose here to outline two theses: on the one hand, that the legal norm may be treated as an empirical fact, and on the other that law as a whole is a fact, a type of political system or organization of power. I shall pursue both points by making a critical examination of Kelsen's doctrine.

I. THE LEGAL NORM AS A FACT

1.1. Kelsen's position

1.1.1. For Kelsen, the norm is not a fact but merely a meaning. He repeatedly insists on the idea that stating a norm is not the same thing as describing a real piece of behaviour. Behaviour may conform to a norm; it cannot be confounded with it. The norm ordains that certain conduct should take place, but it is perfectly possible for that conduct never to happen. The norm nevertheless remains valid.

Likewise, the norm is not to be confused with another fact, namely the act of will that posits it. It is well known that Kelsen was clearly and firmly opposed to St. Augustine's thesis that the law is a set of commands. For the Pure Theory, on the contrary, the norm is not an act of will. It does not even express the will in the psychological sense of the term. It is merely the meaning of an act of will, and an act whereby a norm is posited means that particular conduct ought to take place.³

Nor can this meaning be treated as being a fact, for instance, a mental fact. It is not the meaning given the act by its author. This is only its subjective meaning. The norm itself is the objective meaning of the acts,

between fact and law in law itself is qualified by modern doctrine; see Jerzy Wroblewski, *Meaning and Truth in Judicial Decision*, edited by Aulis Aamio, Helsinki, Juridica, 1979; Patrick Nerhot, "Le fait du droit", In *Archives de Philosophie du droit*, vol. 13, "Le système", pp. 261-280.

³ See e.g. *General Theory of Law and State*, New York, 1945, p. 29 f. (GTL); *Théorie Pure du Droit*, 2nd ed. trans. by Ch. Eisenmann, Paris, Dalloz, 1962, p. 6 f. (TP) and ATN p 2 f.

"that which is given them by law, that which they have according to law, in law."⁴

The norm cannot therefore in any way be regarded as a fact. This thesis seems to rule out any possibility of building up the science of law on the model of the empirical sciences. Nevertheless, Kelsen forcibly states not only that it is similar to or comparable with an empirical science, but that it is an empirical science: "An analytical description of positive law as a system of valid norms is no less empirical than a science of nature restricted to an object given by experience".⁵

1.1.2. Kelsen carefully distinguishes between the legal proposition and the norm. The legal proposition belongs not to law, but to the science of law, a science distinct from its object, in accordance with the positivist epistemology.⁶ Despite their linguistic form, which resembles that of norms, and in particular despite the presence of deontic verbs, legal propositions have the function not of prescribing norms, but of describing those norms, which is what authorizes Kelsen to use the term *descriptive Sollen*.⁷

Thus, while a norm cannot be either true or false, but only be obeyed or not, a legal proposition is for its part capable of being true or false. The difference is the same as that between the function of knowledge and that of will.⁸

⁴ TP p. 3 f.

⁵ GTL p. 163.

⁶ See Michel Troper, "Le positivisme juridique" in *Revue de synthèse*, no. 118-119, "Philosophie et épistémologie juridiques" April-Sept. 1955, pp. 187-204.

⁷ TP, p. 102, ATN p. 120 f. See Roberto Vernengo, "Kelsen's *Rechtssätze* as Detached Statements" in Richard Tur and William Twining (ed.), *Essays on Kelsen*, Oxford, Clarendon Press, 1986, p. 99 f.

⁸ TP, p. 100: "Let us assume that a manual of civil law enunciates the proposition that according to the law (of the State that this manual intends to describe) he who does not carry out a promise of marriage given must repair the damage caused This proposition is false if the law of the State in question does not lay down the obligation in question..." see also ATN, p. 123 where Kelsen has become more severe; the example of the legal proposition becomes; "he who has committed adultery must be punished by prison". It is true on condition that the corresponding norm has been set up by the legislator or established by custom.

The truth or falsehood of the legal proposition can, moreover, be verified: it is true if in the legal order there exists a corresponding valid norm. Thus, though the norm is not an empirical fact, the truth of the legal proposition can be established just like that of the propositions set forth in the empirical sciences, by correspondence with the object described.

1.2. At least two further criticisms may then be brought against this thesis

1.2.1. Firstly, though Kelsen states that legal propositions can be true or false, he only approximately presents the conditions on which they can be true or false.

He raises the matter chiefly in a negative fashion by attacking the theses of sociological jurisprudence, according to which the function of legal science is to predict the behaviour of courts.⁹ He points out in the first place that these theses are aimed at reducing the activity of courts, and that while one may in the limit estimate, by examining a general norm in force, the probability that the courts charged with applying it will produce such and such a particular norm, on the other hand there is no way, by examining the Constitution, of predicting the behaviour of the bodies empowered to produce legislative norms. On the other hand, and above all, it may perfectly well happen that courts refrain from applying a general norm described by a proposition of legal science as valid. It does not however follow that that legal proposition is false. A legal proposition is true if it describes a valid norm, even though it is ineffective in a particular instance.

He has therefore to confine himself to repeating the statement: a legal proposition is true if it describes a norm existing in the legal order considered, i.e. if the obligation that the proposition holds to be imposed by a norm is in fact laid down by a valid legal norm. But all that only shifts the problem. It still has to be determined whether such a norm does exist in the legal order. But as we know, for Kelsen, a norm exists, is valid, if it meets the conditions for belonging to the legal system supplied by the legal system itself; but these conditions for belonging are themselves described by a legal proposition. We therefore arrive at a mere tautology: a legal proposition is true if it states that a norm belongs to the system and it does belong to it; it belongs to it if a legal proposition states that it belongs to it, because it states that the conditions for belonging have been met.

⁹ GTL p. 168.

1.2.2. Secondly, if validity is, as Kelsen says, the very mode of being of norms, then any norm, once put into force, must be regarded as valid as long as it has not been abrogated. A legal proposition is therefore true if it describes a non-abrogated norm. Its truth then depends merely on the *prima facie* validity of the norm, so that the only legal propositions that may be regarded as true are those that confine themselves to reproducing provisions published or notified in official forms, so that one may wonder that the formulation of propositions adds to the reading of the announcements expressing the norms.¹⁰

Kelsen was aware of the objection and attempted a reply. He first of all resisted the temptation to write that if one accepts that side by side with nature there can be a science of nature, it could be similarly accepted that side by side with law there is a science of law, since, as he recognizes, "by contrast with law, nature does not manifest itself in spoken and written words".¹¹ He therefore declares that there "is only one possible reply to the objection, namely that it would amount to accepting that it would be useless to have, side by side with the penal code, a scientific account of the penal code - i.e., generalizing, that the existence of a science of law side by side with law itself would be superfluous".¹² In other words, he seeks to refute the objection using an argument which he has just explicitly said that he regarded as ill-founded.

1.3. *The norm as empirical fact*

1.1.3. As a point of departure, we may take Kelsen's conception of the norm. The norm is a meaning: it is the meaning of an act of will.¹³ However, the notion of meaning has to be examined. Kelsen himself uses the term in two very different ways.

¹⁰ See Mauro Barberis, "La norma senza qualità" in *Materiali per una storia della cultura giuridica*, Dec. 1981, p. 405.

¹¹ TP, p. 101.

¹² *Ibid.*

¹³ TP p. 7: "A clear distinction must be drawn between this "norm" and the act of will setting it up: it is indeed the specific meaning of this act that in intention it is aimed at the conduct of others; however it is something different from that act, and indeed the norm is an "ought (*Sollen*)", whereas the act of will of which it is the meaning is an "is (*Sein*)".

Firstly, he distinguishes, as we know, between subjective meaning and objective meaning of an act. The former is that of the act of will of a man who, in his mind, seeks to secure some conduct from another. The second alone is a *Sollen*, a norm. Saying that an act has the objective meaning of a *Sollen* is saying that the conduct prescribed ought to take place.¹⁴ This objective meaning is assigned to the act of will by a higher norm.

On another side, however, Kelsen also uses this term in connection with interpretation, which consists in establishing the meaning of the norms to be applied.¹⁵ Meaning is given by an empowered body, in the context of an authentic interpretation.

If we agree to combine these two usages of the term “meaning”, we may consider that the norm or objective meaning of an act of will is determined by the authentic interpreter.

1.3.2. In that case, we are indeed in the presence of an empirical fact: not the fact of will that leads to a statement, but the one whereby that statement is interpreted. A number of advantages follow; we shall have to content ourselves with enumerating them. First of all, legal science may be conceived on the model of the empirical sciences, as describing the acts whereby meanings are attributed to statements.

It should further be noted that, as in the empirical sciences, this description is always a prediction and is therefore verifiable. Of course, the legal proposition does not predict that the conduct prescribed will happen, nor even that punishment will be inflicted should it not. It predicts that a certain meaning will be assigned to an act. Thus, the legal proposition of the science of constitutional law that: “according to the French Constitution, the Prime Minister must submit his government’s resignation should a motion of censure have been adopted by the National Assembly” predicts, not that the Prime Minister will in fact tender his resignation if the conditions set out in Article 50 of the Constitution are realized, but that that Article will be given precisely the interpretation indicated and that it will be considered that the Prime Minister is obliged to tender his resignation.

¹⁴ TP p. 10-11.

¹⁵ *Ibid.* p. 452 f. In reality the idea that interpretation might consist in establishing “the meaning of the norms” is hard to reconcile with the definition of the norm as meaning, since it is hard to conceive a meaning having a meaning. It must therefore be considered that interpretation consists in determining the meaning not of norms, but of the texts to be applied; see Michel Troper, “Kelsen, la théorie de l’interprétation et la structure de l’ordre juridique” in *Revue Internationale de Philosophie*, 1981, pp. 518-529.

This conception further justifies the formulating of legal propositions that are not the mere reproduction of statements internal to legal discourse, but are either more general or different, but nevertheless verifiable by the procedure just indicated.

At any rate, this is not without implications for the relationship between logic and law. The major difficulties lie in the facts that, firstly, logic can relate only to true propositions, and therefore not to norms, and secondly, that even if the practical syllogism is accepted, the conclusion is formally valid without there ever having been a corresponding norm. Thus, if all thieves must be punished and Dupont is a thief, then Dupont must be punished. But it is perfectly possible and even likely for the norm "Dupont must be punished" never to be uttered.¹⁶ And if it is construed as a theoretical syllogism with as major premise a legal proposition, as minor a fact, and as conclusion another legal proposition, the latter may well be logically true or false but cannot mean that there exists a valid norm "Dupont must be punished".¹⁷

However, if the penal code is interpreted as meaning that all thieves must be punished and Dupont's behaviour as meaning that he is a thief, then it may be concluded that Dupont's behaviour means that he must be punished. But this conclusion is not simply a legal proposition capable of being true or false. It may be regarded as empirically true if the norm "Dupont must be punished" is actually uttered, i.e. if the meaning attributed to the act by the judge is identical to that attributed to it by the legal proposition forming the conclusion of the inference.

Finally, if law is envisaged as the attribution of meanings, there is no longer any difference between the object of legal science and that of legal sociology.

II. LAW AS FACT

The law as a whole may be treated as a fact, specifically as a political fact, in such a way that the theory of law may be used as a method of analyzing political power.

¹⁶ ATN, especially chs. 58-59.

¹⁷ ATN, p. 203.

2.1. Kelsen, wrongly called a formalist, clearly saw this possibility. To the traditional legal and political doctrine conceiving the State and law as two distinct beings and intending thereupon to consider their relationships, Kelsen opposes his own monistic conception. This is based on a definition of law as an immanent normative order of constraint, effective in the large scale and in general fashion.¹⁸

The legal order falls into a general classification of normative orders. It belongs, first of all, to the class of orders that "regulate men's conduct in their mutual relationships, in contradiction to normative orders which, like logic, have no social nature".¹⁹ Then, among social orders, Kelsen distinguishes three types, which are clearly ideal types: those that prescribe conduct without attaching any consequence to obedience or disobedience; those that command, attaching a reward to obedience and a penalty to disobedience, i.e. incorporating a sanction (in the broad sense); those that command, attaching a sanction to opposite conduct (this time in the strict sense of penalty).²⁰

Among these orders that establish sanctions, Kelsen again distinguishes those that establish transcendent sanctions (those emanating from a suprahuman instance) and those that establish immanent sanctions (realized in this world by men).

Having thus established a classification he proceeds to classify and define *per genus proximum et differentiam specificam*: law is a) an order of human conduct b) an order of constraint, since it prescribes conduct by attaching immanent, socially assured sanctions to contrary conduct.

Finally, among legal orders, he seems to draw other distinctions: on the one hand between the law of primitive societies and modern law in which the exercise of constraint is erected into a monopoly of the juridical collectivity; on the other hand, between legal orders in which the exercise of constraint is

¹⁸ The problem is fully discussed by Renato Treves, *Sociologia del diritto*, Turin, Einaudi, 1987 and "Hans Kelsen et la sociologie du droit" in *Droit et société* no. 1, August 1985, p. 15 f.

¹⁹ "The acts of human thought that regulate the norms of this order do not relate to other men", TP p. 34.

²⁰ It must be stressed that for Kelsen the sanction is not placed side by side with the prescription in order to guarantee its execution. On the contrary, it is a constitutive condition of the prescription, and there is no prescription unless a sanction is attached to contrary conduct.

decentralized (where the individuals inflicting the constraining acts have the nature of specialized organs), and those in which such exercise is centralized.

However, a lunatic in an asylum might well construct a normative order that would command conduct and prescribe specialized organs to inflict punishments for contrary conduct. Such a normative order would not be a legal order, and Kelsen then adds another condition: the order must be effective, as a whole. In other words, when it comes to the legal order looked at overall, efficacy is a condition of validity, or again, law is law only if a fact corresponds to it.

2.2. *This definition is not safe from all criticism.*

2.2.1. Thus, the "robbers' gang" is a normative order that sets up immanent sanctions and prescribes acts of constraint and ought therefore to be regarded as a legal order. This case, which embarrasses Kelsen, can be solved in only one way: it has to be decided that the robbers' gang is not "interpreted" as a legal order, since no fundamental norm is supposed, by the terms of which one ought to behave in accordance with that order.²¹ This is because it lacks durable efficacy. However, if the robbers' gang acquires, over a certain piece of territory, the monopoly of constraint, it must be regarded as a legal order, or, and this comes to the same thing, as a State. This is the case for the pirate States of North Africa between the 16th and 19th centuries.

But Kelsen does not pursue the argument to the end. For him, efficacy is only one condition of validity; in other words of the specific mode of existence of law. It is not validity itself, or else it is only the *conditio sine qua non* and not the *conditio per quam* of validity. That is why it is impossible for him to treat law as a fact. The law as a whole is a *Sollen*, and must be treated as a *Sollen*. And as, according to him, fact presents the meaning of a *Sollen* only from the viewpoint of a norm, he has to assume a fundamental norm in order for the law to be valid.

2.2.2. Alf Ross's critique of this notion of validity is well known.²² *Validity* or *bindingness*, he writes, means that there is an obligation to obey the law. That obligation cannot be a legal obligation proper, i.e. created by a legal rule, an obligation in accordance with the legal system; it must be an

²¹ *Ibid.* p. 95.

²² Alf Ross, "Validity and the conflict between Legal Positivism and Natural Law" in *Revista Juridica de Buenos Aires*, 1961-IV, pp. 46-90.

obligation towards that system, in other words an obligation derived from principles of natural law, or a moral obligation. That is why he regards those positivists who employ this concept of validity as *quasi-positivists*, who constitute only one school within jusnaturalism. Kelsen would, then, be one of these *quasi-positivists*.

Ross's argument would be irrefutable, and Kelsen would in fact have to be regarded as a jusnaturalist, if the fundamental norm had to serve as a foundation for the validity of the legal order in the sense that Ross gives to the term validity. In reality, however, the word is ambiguous, and Kelsen uses it in three quite different senses. In the first place, there is *relative validity*, which is simultaneously the mode of existence of the norm, or if you like its status, and its bindingness *vis-à-vis another norm*. Where an act thus has the meaning of a legal norm from the viewpoint of a norm, we shall state that the author of the act has created a valid or binding norm in relation to the higher norm. In a second sense, the validity is said to be *absolute*. It is then a property of the legal system as a whole, and means that the law as a whole is binding. Kelsen rejects this concept of absolute validity just as energetically as Ross.²³ Finally, validity may designate merely the logical status of a proposition, its quality of being a legal norm, independently of its bindingness. Now when Kelsen says that a fundamental norm is supposed as a basis for the validity of the constitution, he does not claim that that constitution is binding, but only that legal science must assume the fundamental norm if it wishes to treat the constitution as a norm capable of being a basis for the validity, thus the normative character of statutes and lesser acts, and if it wishes therefore to treat the legal order itself as law. If, then, the fundamental norm is merely an epistemological assumption, Ross's criticism falls.

2.2.3. However, Kelsen's position lacks precision, and he seems to have hesitated between two attitudes. The first consists in treating the fundamental norm as the foundation for the validity of the constitution in the first sense. This is how the theory of the *Grundnorm* in the Pure Theory has generally been interpreted, particularly because of the use of certain formulas. Kelsen writes, for instance, that one must "assume the fundamental norm 'one must act as the constitution provides'".²⁴ On the other hand, he indicated on various occasions, from the second edition of the Pure Theory onward and

²³ TP pp. 141f.

²⁴ *Ibid.* p. 267.

more clearly in later works, that this was merely a necessary presupposition for the constitution of a science of law.²⁵

But if the fundamental norm is merely an epistemological presupposition, then the idea of an *objective Sollen* must be abandoned, which Kelsen does not do. There is therefore a contradiction between the idea that the law is a binding order that merely has to be supposed to be valid in order to be able to examine it from the viewpoint of legal science, and the assertion that it constitutes an *objective Sollen*. One might therefore think of abandoning this idea and conceiving of the legal order as a fact of a certain type. But for that one cannot employ the definition given by Kelsen, since it is based on exclusively material criteria.

2.2.4. This definition has in fact several defects.

First of all, it allows uncertainty as to the criteria to persist. Thus, the distinction between immanent sanctions and transcendent sanctions is far from being clear, and as far as primitive societies are concerned, it is often impossible to distinguish between the normative orders of morality, law and religion.

There is a similar uncertainty as to the criterion drawn from centralization. This additional criterion is necessary for Kelsen, who maintains the thesis of the unity of State and law, in order to assert that international law is a legal order even though it is not a State. The thesis of unity can then be easily corrected: the State is the name given to a centralized legal order. That being said, if by "centralization" what is meant is an organization in which the exercise of constraint is the monopoly of specialized agencies, then a considerable difficulty for the unity thesis has to be faced: the acts of constraint are related no longer to the legal order, but only to agencies that carry them out. Similarly, acts of will, which have the objective meaning of individual norms, are not related to the legal order either, but only to their authors, i.e. in the case of contracts, to private individuals. We thus come back to the dualism of public law and private law, and hence that of State and law, that it was intended to eliminate.

²⁵ E.g. p. 265: "The validity of this Constitution, its character as a binding norm, must be supposed, accepted as hypothesis, if one wishes it to be possible to interpret acts set up in conformity with its provisions as the creation or application of general valid legal norms, and the acts done in application of these general legal norms as the creation or application of valid individual norms", and especially "The Function of a Constitution" in Richard Tur and William Twining, *op. cit.* pp. 109-122 and ATP, pp. 203 f. See Ian Stewart, "The Basic Norm as Fiction" in *The Juridical Review*, 1980, part 2, pp. 199-224.

Finally, the formal properties that Kelsen finds (by observation?) in legal orders cannot be found in all orders belonging to the class of legal orders.

2.3. One is therefore brought to conceive of a different approach and to treat the law as a fact simply defined by normal characteristics. Which ones?

2.3.1. Here again, Kelsen can be useful. Having defined the legal order by its material properties, he goes on to examine the formal properties or structure of normative orders, distinguishing two types: static and dynamic. In a dynamic system, a norm belongs to the system because it is the meaning of an act performed in a certain manner, prescribed by another norm. In a static system, it belongs to it because its content can be subsumed under the content of another norm.

Kelsen feels that "the systems of norms that constitute legal orders have in the main a dynamic character".²⁶ He might, by the way, have thought of defining law by this characteristic. If he did not do so, this is doubtless both because he did not seem to consider that the legal order is the only type of normative order that "presents an essentially dynamic character" and because he was seeking in reality a definition capable of giving an account of the "true nature" of law, a definition founded, consequently, on material characteristics. The assertion that law is an essentially dynamic order appears in Kelsen as a proposition of the general theory, arrived at after considering a large number of positive legal orders defined as immanent orders of constraint.

However, it is inexact. It is true that if a norm is to be applied to a subject, the latter cannot in most cases escape from it by maintaining that its content is not in conformity with that of a higher norm and that it is therefore not a real norm. Nor, obviously, can he replace the norm being applied to him by another norm, which would have a content in conformity with that of the higher norms. Kelsen is right to stress that norms are not created by themselves nor eliminated by themselves, and that there are not void norms but merely norms that can be annulled. If, consequently, like Kelsen, one takes validity to mean the mode of existence of norms, it is certain that norms acquire this validity (and lose it) solely because of the way they are posed, in accordance with the dynamic principle, and it must be

²⁶ TP p. 261. For a more developed criticism of Kelsen's thesis that the legal order is essentially dynamic, see M. Troper, "Système juridique et Etat" in *Archives de Philosophie du Droit*, tome 31, 1986, pp. 29-44.

accepted that a norm with any content whatever may be validly created provided this is done by an empowered agency.

Nevertheless, this is merely the *prima facie* validity, the one concerning the addressees of norms. Let us on the other hand consider the examination carried out by a court that a norm has been referred to for annulment: it will obviously not confine itself to finding that it has been laid down by an empowered body and in accordance with the procedure prescribed by a higher norm. It will also consider - and is bound to do so - whether the content of the norm is not contrary to that of a higher norm. Likewise, when any agency whatever of the legal order issues a norm, it does not generally confine itself to invoking the competency conferred on it by a higher norm; it also motivates its decision by stating that it constitutes a correct application of the basis of the higher norm. Thus, decisions to put into effect or to annul legal norms are justified by considerations having to do not merely with the procedure of promulgation, but also with the content of the norms. It is inexact to state, as Kelsen does, that the legal order has merely a dynamic character. It has a two-fold character.

It is, then, possible to base oneself on these structural properties of normative orders in order to stipulate a definition by deciding, despite Kelsen, to call *law* any normative order structured both statically and dynamically, and not to call *law* any normative order structured otherwise, for instance because it has no hierarchy, or has only a static hierarchy or even only a dynamic hierarchy. The legal order is a species of normative order characterized by a dynamic and static hierarchy.

2.3.2. The fact cannot be concealed that this definition is paid for at a perhaps high price: it will not be possible to speak of feudal law, nor even of Roman law, at least at the time of the Republic. But it was accepted that there was no natural object that necessarily had to be called law, and it is therefore indifferent that what is ordinarily called "Roman law" is not so called in this discourse. On the other hand, one will have available an intellectual tool capable of advantageously performing certain functions, which may in particular usefully permit a definition of the State, a description of its operations and the illumination of certain theories on the State.

2.3.3. First of all, if Kelsen's thesis of the identity of State and law is accepted, the term *State* is no longer synonymous with *political power*, since only some systems have such a specific structure. The definition of the State may thus be presented *per genus et differentiam i*. This is the approach of many authors, even classical ones, who have on the one hand a broad

definition of the State as identified with power, but on the other wish to discuss questions like that of legal personality or State sovereignty, which is obviously impossible for some of these "States", like primitive societies or the Greek polis. They are therefore often led to speak of the *modern State*, as a variety of State. They sometimes define it in terms of law: "the modern State is a legal system".²⁷ But the State that is not the modern State cannot be defined except negatively, and they can say nothing about it. It is therefore much simpler to say that the State is a specific form of political power: it is power exercised in legal form, i.e. in the form of norms organized in a static and dynamic manner.

We here join up with an intuition of Kelsen's, which he unfortunately did not develop, but did succinctly enunciate at a conference. It is reported by his biographer: "the question of natural law is the eternal question of knowing what is hidden behind positive law. Anyone looking for the answer will, I fear, find neither the absolute truth of a metaphysics nor the absolute justice of a natural law. He who lifts the veil and does not close his eyes will find nothing there but the hideous Gorgon face of power staring at him".²⁸

The definition of the State by law thus allows it to be characterized as a specific form of power. What remains is to seek to understand its functioning and the particular ideologies that it arouses.

We must first look at things from the viewpoint of the supreme authority. Let us call this *Rex*, in homage to H.L.A. Hart. As soon as the group goes beyond a certain size, *Rex* obviously cannot issue commands to govern all possible human behaviour. He must therefore either give up regulating all of it and allow moral, religious or other norms to apply, or else have some commands issued by others. Two paths are possible:

a. Firstly, *Rex* may delegate part of his authority to officials exercising it in his name, for instance in a province or for a particular type of issue. The subjects must obey these officials merely because they speak in the name of *Rex*, i.e. because *Rex* has given them the power of issuing commands in his place. To justify their decisions and exact obedience, it is enough for the officials to invoke the empowerment given by *Rex*. This system may then be called "dynamic" in Kelsen's sense.

Besides the obvious advantage of simplicity, it presents a number of considerable drawbacks: firstly, *Rex* cannot determine beforehand the content

²⁷ A. Passerin d'Entrèves, *La notion d'Etat*, Paris, Sirey, 1969, p. 123.

²⁸ R. Metall, *Hans Kelsen, Sein Leben und Werk*, Vienna 1969, p. 30.

of the commands issued by the officials. He can of course send them directives from time to time, revoke them if not satisfied, or reform their decisions, but he cannot exercise true control over the great mass of these commands. All the ones they issue, whatever be their content, will be equally binding. For *Rex*, delegated power is in part lost power.

But for the official the situation is not always favourable either. To be sure, he does have real power, but each of his decisions appears as coming from him alone, from his will alone. If he is empowered to issue commands with any content whatever, the choice among various possible contents is his responsibility alone. He can justify it only by considerations of appropriateness, and cannot demonstrate their necessity.

b. *Rex* may then, while still delegating power, indicate to the official, through a general directive, the content of the decision to be taken in this or that type of case. Each of the decisions of the subordinate authority will then be doubly justified: on the one hand by the delegation received, and on the other because it appears as the mere application to a specific case of *Rex*'s general directives. The system then becomes not only dynamic but also static.

The advantages of such a system are considerable. They may be considered first of all from the viewpoint of the officials. The first and the most obvious one is that their decisions are rationally justified. They do not even seem to be decisions, since the action of these officials, judges for instance, seems to consist in the mere, quasi-mechanical, application of general directives. The official, who has no personal qualification to exact obedience, may then secure it if he shows that he is not expressing his own will but is merely the instrument of the will of another, who is justified in expressing it. But at the same time this official is not devoid of all power. In fact, the directive is frequently confined to setting a framework, and leaves the subordinate authority a more or less wide margin of discretion, but almost never a zero one. On the other hand, the general directives must in fact be interpreted. But as we know, interpreting is largely recreating.²⁹ The legal or State form thus both allows decisions to be justified, thus facilitating their implementation - and the exercise of power to be dissimulated.

²⁹ On the functions of the theory of interpretation, see M. Troper "L'idéologie juridique" in *Analyse de l'idéologie*, collective work edited by G. Duprat, Paris, Galilée, 1980, pp. 221-234; "La motivation des décisions constitutionnelles", in *La motivation des décisions de justice*, Travaux du Centre National de Recherche de Logique, edited by Ch. Perelman and Ch. Poriers, Brussels, 1978, pp. 287-302.

From *Rex*'s point of view, the advantages are not less great. In the first place, he continues as in the dynamic system to benefit from the advantage of the division of labour, but this time maintaining control over power, since at least in principle he predetermines the content of the decisions to be taken by the officials. He predetermines it not merely in principle, but even effectively, if he reserves to himself the power to interpret the general directives.

Moreover, like his officials, he benefits from the functions of justification and of dissimulation of power offered by the dynamic and static principles. He benefits from the dynamic principle because he can present himself as the mere depositary of a power which does not belong to him, but which he exercises on behalf of the real holder, God or the sovereign people. He benefits from the static principle because the very content of his decisions, including the most general ones, can appear not as the expression of his own will but as being deduced from pre-existing, more general directives, like what in modern systems are called *principles*.

This definition of the State as a static and dynamic normative order may then be used in order to seek to illuminate certain doctrines. What is meant here by "doctrines" is a set of theses on the State, whether enunciated by the so-called science of the State or general theory of the State (*Allgemeine Staatslehre*) or invoked in the discourse of State agencies themselves. What we have in mind here are, for instance, theses regarding sovereignty, personality, the continuity of the State or its constitutive elements.

They are generally perceived as true or false, but they may also be regarded as ideologies and their appearance, development or changes explained on the basis of the structure of the system in which they operate, in such a way that it will no longer be the State that is explained by the doctrines but the doctrines themselves by the State.

THE CONCEPT OF FACT IN LEGAL SCIENCE

FRANÇOIS RIGAUX

INTRODUCTION

1. Neither fact nor law admits of an initial definition, though their interrelationships are exactly what these thoughts are about. We therefore have to start from a two-fold approximation. This applies both to the human life situations that are the object of legal norms, and to the way these norms are in fact produced. Not only is there "fact" at both ends of the chain that seems to join fact and law, or more exactly not only can a factual element be discerned at the heart of the norm itself, a truth of everyday observation that deserves to be elucidated; but what the practitioner calls "fact", the life situation submitted to him, is not completely free from the imprint of the law.

2. It is first of all necessary to throw more light on the factual data of any legal regulation. The term "positive law" contributes to this. The law is set up, the legal order is a combination of norms and institutions with a geographical area of distribution valid for a definite period of time. The formal sources of written law are those that enter into this spatio-temporal environment, which guarantees their positiveness but also gives them a two-fold relativity, in the best delimited fashion. Norms change and are not the same everywhere.

The law is an object of knowledge, and that is its primary link with the science of social facts: studies of law tend in particular to initiate the future practitioner into the understanding and the correct identification of sources. The acts that produce legal norms are facts, such as the promulgation of a constitution or a law or the conclusion of an international treaty. This banal statement is nevertheless not the most illuminating one possible. It is much more interesting to look at the interaction of various legal systems with each other. Phenomena familiar today, such as direct application of a norm of

international law in the domestic legal order of a State, or one of foreign law, deserve special attention, and will form the first part of this study.

3. More exact knowledge of the factual elements inherent in law will destroy the illusion of pure normativity in absolute contrast with the reassuring coarseness of facts, and also lead to a re-evaluation of their very nature. Despite the appearances suggested by ordinary language, in order to be covered by a norm a situation lived through by social actors has to be brought under a conceptual system that brings out preconstituted legal elements inherent in the situation, in the absence of which it is excluded from the regulation that it was supposed to be made subject to. Whether in domestic law or in private international law, the cases in which a given situation of fact seems open to being covered by competing norms best reveal the ambiguity of the concept of fact in legal science. The second part of this study will endeavour to deduce, from hypotheses of competing norms or conflict of laws, conclusions that justify a more exact assessment of the dialectic between fact and law.

4. The foregoing thoughts have been expressed without prejudice to the exact meaning of the concepts "fact" and "law". In the usual language of lawyers, as attested by the expressions *Da mihi factum tibi dabo ius*, *Iura novit curia*, they would occupy antinomic and complementary positions in methods of applying law to fact. One of the difficulties of the object of these thoughts is the need to use the very concepts whose exact outlines are problematic, and consequently to work on two levels; ordinary vocabulary, though it cannot be done without, has to lead to a view purged of concepts that convey controversial approximations. Given these preliminary terminological precautions, then, we shall endeavour now to seek fact in law and law in fact.

1. FACT IN LAW

5. Any legal order is defined by those to whom it is addressed. International law has States as its primary subjects; domestic law has binding force on State organs and applies to people falling under them whether by nationality or by the link between a person or situation and the State's territory; non-territorial legal systems such as religious law, sporting law, professional usages, etc. themselves define the qualifications for being subjected to the obligations and benefiting from the rights that each system secures for those who satisfy the membership condition concerned. Every system defines the terms of validity of the rules it is made up of, and determines the regularity

of acts accomplished by its organs, and that validity cannot be verified by any criterion external to it.

The multiplicity of legal orders, the relationships that necessarily arise among them and the specific relations that link people who come under different systems have as a consequence that the norms and institutions of each of them necessarily have recognized effects for the functioning of other systems. It is therefore necessary to accept two statements that are hard to reconcile, namely that every legal order constitutes an *autonomous* system, the sole judge of its internal validity, without any of them being able to refuse to maintain certain relationships with other systems.

6. It is significant that the concept of "fact" has traditionally been used to denote the nature assigned in one legal order to the norms and institutional acts of other legal orders whenever the latter had to be given some effect therein. According to a celebrated pronouncement of the permanent International Court of Justice, "national laws are mere facts" as far as the international legal order is concerned,¹ and until a recent period legal scholarship, on the basis of continuing case law, taught that the foreign law applicable within a State in virtue of the rules on conflict of laws was likewise a mere fact, subject to the rules of proof required by that description, with breach of them being outside the control of legality by the Supreme Court.²

7. Before indicating the arguments that have led to a revision of these over-categorical descriptions, it would be best to consider the share of truth they contain. The best viewpoint for determining the exact nature of a norm belonging to another legal system is a jurisdiction whose decisions are not subject to any further control of legality. For such a jurisdiction, like the International Court of Justice, the European Court of Human Rights or the Court of Cassation or Council of State of a country with no constitutional jurisdiction, the nature of the law proper to it is bound up with the powers given it to disclose the meaning of each of the norms of this law. The power of interpreting the norm in terms beyond any control is also, from the viewpoint of the supreme jurisdiction in its system, what defines the

¹ Cour permanente de justice internationale, "Haute-Silésie polonaise", arrêt no. 7 du 25 mai 1926, *C.P.J.I.*, Série A, p. 19.

² Among the references, see esp: F. Rigaux, *La nature du contrôle de la Cour de cassation* (Brussels, Bruylant, 1966), no. 80.

properly legal nature of the normative system. A text of an international treaty or of a law is given life and meaning by the bodies capable of interpreting it. Since life means change, the most authoritative legal interpretations are provisional, and may be supplemented, qualified or even overthrown by a later interpretation.

8. Whatever be the circumstances in which a jurisdiction supreme within its order applies or takes into consideration³ a norm borrowed from another legal order, it could not, vis-à-vis the latter, exercise the power of last-resort interpretation. Before an international judge or a court in another State, a State norm is outside its proper place of application and interpretation. Within the legal order to which it belongs there exists a supreme jurisdiction that has the power of last resort for such interpretations. It would be incompatible with the formal completeness of any legal order for the power to decide conflicts of interpretation in sovereign fashion to be devolved to more than one jurisdiction. Consequently, in legal orders in which it is "foreign", the norm must be accepted with the potential meanings given to it by the way it has been applied and interpreted in the legal order from which it comes. Since these interpretations are not binding for the future on the jurisdiction that has once formulated them or repeated them, they are of the nature of a fact; they are deprived of the obligatory nature of the law itself. Nevertheless, organs of other legal orders regard themselves as bound by this fact that is incorporated in the norm.⁴

9. When an international jurisdiction describes the legislation of a State as fact, it is giving no doubt imperfect expression to a correct observation: the only law that is properly legal vis-à-vis such a jurisdiction is the law that itself contributes to formulating, since it is the internal law of its own legal order, international law. The international jurisdiction has no power to pronounce as to the validity or meaning of a State norm within the interior of the legal order to which that norm belongs. It is for it, and this is quite different, to decide whether the applications to which the State norm has given rise constitute breach of an international obligation on the State. To

³ On this distinction, see especially the doctrinal references contained in F. Rigaux, *op. cit.* (note 2), p. 129, note 17, and no. 232.

⁴ For a further treatment of this question, see esp: F. Rigaux, "Le juge, ministre du sens", in *Justice et Argumentation, Essais à la mémoire de Chaïm Perelman* (Editions de l'U.L.B., Brussels, 1986), pp. 85-89.

reach such a conclusion, it refers to elements which in its regard and from its viewpoint are of a factual nature: How has the norm actually been applied and interpreted in the internal order of the State that is appearing before it? As far as problems of interpretation in particular are concerned, it is not for it to replace the competent bodies of the State system. It confines itself in this connection to internalizing the actual practice that has taken place within the internal legal order.

Some three years after it handed down the ruling cited above, the permanent International Court of Justice had occasion to pronounce in the sense just indicated. In two rulings of the same date,⁵ it decided that the provision of French law applicable to the money of account of a bond made out in French francs had to be accepted within the international legal order to which the court belongs with the interpretation it had been given by French case law.⁶ Bearing in mind that in French law interpretation by judges is a mere fact that binds neither other judiciary bodies nor, for the future, the supreme jurisdiction that has given it, whereas a body of another legal order declares itself bound by this interpretation, one is bound to conclude that this body accepts as a fact imposed upon it the case-law interpretations incorporated into the text of the norm.

10. A State judge does something very similar when he, in virtue of one of his rules on conflict of laws, applies a foreign legislative provision. Thus, the Belgian Court of Cassation, in a recent ruling, decided that the trial judge, in interpreting foreign law, had to follow the guidance given by the way that law had been interpreted by the courts in the country it originated in.⁷ The trial judge and the Court of Cassation itself are without an essential prerogative of the judiciary power, that of reading into the terms of the norm they are applying the meaning that is appropriate to recognize in it. The

⁵ Cour permanente de Justice internationale, "Affaire concernant le paiement de divers emprunts serbes émis en France", arrêt no. 14 du 12 juillet 1929, *C.P.J.I.*, Série A, nos. 20-21; "Affaire relative au paiement en or des emprunts fédéraux brésiliens émis en France", arrêt no 15 du 12 juillet 1929, *ibid.*

⁶ *C.P.J.I.*, Series A, nos. 20-21, pp. 46-47. The following extract is particularly significant: "It is French laws as they are applied in France that in reality constitute French law ...". One could not assert more forcibly the factual nature of the State system from the viewpoint of an international jurisdiction.

⁷ See esp: Cass.(1^e ch.), 9 octobre 1980, "Babcock-Smulders c, Creusot-Loire", *Rev. crit. jur. belge*, 1982, 8, note F. Rigaux, *ibid.*, pp. 44-57.

same reservation applies to the Supreme Court of a State when it has to control application by a trial judge of a directly applicable norm of an international treaty: if the international jurisdiction competent to supervise correct application of the treaty by the States party to it has itself spoken as to the meaning and scope of such a norm, this interpretation must be respected in those States.⁸ As thus exercised, the control of legality is deprived of one of its essential attributes: supplying the sole authorized reading of the normative text. The jurisdiction confines its control to verifying whether the trial judge has respected the interpretation handed down by the only body authorized to give that reading, namely the one belonging to the same legal order as the norm itself.

11. Another example may be taken from recent case law of the Belgian Court of Cassation, and a no less significant one, of the difference between the condition of foreign law and of *lex fori*. Belgian case law has undoubtedly rejected the old doctrine according to which foreign law is a mere fact that could be taken into consideration by the judge only if one of the parties called for its application, proof of which would be handled according to the usual civil procedural rules applicable to the facts of the case. Not only does the judge apply *ex officio* his own rules on conflict of laws, within the limits of the principle of party disposition, but he may also *ex officio* inform himself on the content of the foreign law applicable.⁹ However, and here there appears an essential difference from the condition of *lex fori* provisions, governed by the maxim *iura novit curia*, when he applies a provision of foreign law the judge cannot surprise the parties: he must, in order to respect the adversary principle, submit this application to prior discussion.¹⁰

⁸ On this point, see the reference cited in note 4.

⁹ See especially the judgement cited in note 7.

Apart from Belgian case law, one might in this connection cite several recent codifications, particularly Art. 12(1)(1) of the Spanish Civil Code as amended by decree law of 31 May 1974; Art. 2(1) of the Turkish law of 20 May 1982 on private international law and para. 2 of the Austrian law of 15 June 1978 on private international law. French case law goes in an opposite direction. Following a less decisive ruling by the Commercial Chamber of the Court of Cassation (21 June 1982, *Rev. crit. dip.*, 1983, 77, note Batiffol), the First Civil Chamber has returned to the traditional solution: the rules on conflict of laws need be applied by the trial judge only if the parties agree on this point (22 April 1986, *Clunet*, 1986, no. 25, note Sinay-Cytermann).

¹⁰ As well as the judgement of 9 October 1980, see: Cass. (2e ch.), 15 septembre 1982, "Gilson, Pas.," 1983, I, 68; (1e ch.), 22 octobre 1982, "Egon Oldendorf c. S.A. Certex

The application of the maxim *iura novit curia* in domestic law quite obviously rules out a judge's subordinating to adversary debate on the content of domestic law the *ex officio* application of the relevant provision of *lex fori* to the facts of the case, which are all that are subject to such discussion.¹¹

12. To conclude this first part of the argument, it has to be stated that the organs of judiciary power have rightly abstained from extending to norms taken from another legal order the interpretive mastery they exercise over *lex fori*. This does not amount to shutting oneself up in the ancient dichotomy between fact and law in order to give back the quality of being a "mere fact" to norms taken from another legal order. While denying that a norm loses its legal nature by being taken into another legal order than the system from which it is taken, it has to be accepted that it has a different quality from that belonging to provisions of *lex fori*. Although it is deprived of legally binding force, the case law that has interpreted a norm shows the way it has actually been applied within the legal order to which it belongs, which is closer to fact than to law. Likewise, the obligation to subject to adversarial debate the discussion of the content of a foreign norm puts the norm outside the scope of an essential corollary of the maxim *iura novit curia*, namely the *ex officio* application of law to the facts of the case. Here again what has happened has been a sort of assimilation of the norm to the facts in dispute.

2. LAW WITHIN FACT

13. To define the exact nature of the situation of fact on which a judge exercises his jurisdiction, it may be useful to take a detour through an analysis of the multiplicity of legal orders capable of dealing with the situation. But before extending consideration towards the most striking form of pluralism, that of autonomous legal orders, one should recall competition among norms of domestic law applicable to the facts brought before the judge. We shall confine ourselves to one example, namely the many possible descriptions of a punishable act.

Natic, Pas.", 1983, I, 254; (1^{re} ch.), 18 février 1985, *Rechtsk. Weekbl.*, 1985-1986, 952, quashing decisions that had applied a provision of foreign law "without allowing the parties to come to agreement on the point" (22 October 1982).

¹¹ See esp. the work cited in note 2, nos. 34-35.

The case law of the Court of Cassation is well known. The trial judge has to deal with a fact under all the descriptions that it may take, and “the accused, if acquitted by this judge,¹² can no longer be tried for the same fact, even under a different description”.¹³ Thus, to the seemingly indivisible unity of *the* fact there is opposed a plurality of descriptions. The notion of fact in this context is however very approximate. In reality, to each of the many descriptions under which the situation is justiciable, there correspond complexes of fact that are themselves different. Apart from the case, which need not be considered, of ideal competition between offences, there are as many descriptions as there are facts. Taking the example of a woman found dead in her home, whose death is attributable to observable wounds on her body according to the forensic physician, at least four descriptions are possible: involuntary homicide, voluntary blows that caused death without the intention of doing so, murder and assassination. In the four cases there is the same actor and the same victim, but what distinguishes each case from the others is indubitably something in the area of fact, namely the content of the guilty intention of the culprit. If the husband has been acquitted on any one of the four accusations, he cannot subsequently be tried for any of the three others. Nevertheless, the facts that each of them implies are strictly different, not to say antinomic: while premeditation adds only an aggravating circumstance to murder, there is an absolute contradiction between murder and the other two forms of homicide. To cover all four cases, the concept of unity of the fact is only a crude approximation: to each description there corresponds a complex of different facts. In order to handle the concepts rigorously, each of the descriptions must be equated with the factual causal chain which it requires. The sole fact to which the Court of Cassation’s case law refers is, rather strangely, a fact devoid of any legal description and consequently not punishable. In order to be punished, this fact needs to be supplemented by factual descriptions that may correspond to the requirements of a legal description, but from that point also other elements of fact must

¹² Before the law of 26 February 1981 extended the same principle to an acquittal ruling handed down by an assize court, the words “this judge” in the ruling of 20 December 1976 designated “the correctional magistrate or police magistrate”.

¹³ Cass. (2^e ch.), 20 décembre 1976, *Pas.*, 1977, I, 445. When the trial judge alters the initial legal description, he is liable to be quashed if he has omitted to state that the fact constituting the offence of which the accused has been declared guilty “was the same as that which was the ground for bringing trial or was included therein” (Cass., 2^e ch., 16 novembre 1977, *Pas.*, 1978, I, 301).

be excluded that are incompatible with the foregoing and would justify a different description that rules out any other one.

These thoughts lead to a two-fold conclusion: the "single" fact with which the judge deals is an abstraction not corresponding to any situation in real life, which shows the difficulty, for legal practitioners and judges, of discovering truth, the single truth of facts; duly established, with the circumstances specified in a given indictment, the fact is inseparable from the single legal description that necessarily belongs with it. Accordingly, the distinction between fact and law must be judged as artificial: in order to be given punishment, the fact must contain all the elements specified by the legal rule, the single relevant legal rule.

14. The insurmountable contradictions in which one gets entangled if one seeks to dissociate the fact from its legal description appear much more strikingly when one passes from domestic penal law to private international law. It is then no longer possible to argue within the limits of a domestic legal order; the coexistence of several State laws must be accepted.

Suppose a Moroccan woman marries a non-Moslem Belgian in Brussels. Such a union is strictly prohibited by the Moroccan Code of Personal Status, which has kept the ancient Islamic rule whereby a Moslem may not marry an infidel.¹⁴ To be sure, the Belgian registry officer will agree to celebrate the marriage, since the bar put up by the national law of the future spouse has to be found contrary to public policy. This example of problematic marriage brings out well the point that the fact is inseparable from its description. In Belgian law, the man and the woman are spouses to whom the rights and duties deriving from that state apply. In Moroccan law, the woman is guilty of fornication, all the more abominable since she has betrayed her membership of the Muslim community. The treatment given to the couple in the two legal orders will be radically different. If the specific relation between that man and that woman is called "situation of fact", that relation is inseparable from the antinomic legal connotations that necessarily accompany it. For the application of Belgian legal rules on the respective rights and duties of spouses, or if a divorce action is being heard, the situation of fact brought before the judge is that of spouses. The situation that a Moroccan judge or Moroccan diplomatic and consular officers working in Belgium would have to recognize is however an opposite one. Any attempt to reduce to a single situation the two complexes of facts separated by the antinomic legal assessment of the decisive fact, the celebration of a

¹⁴ Mudawwana, art. 29(4).

civil marriage in Belgium, would require abstraction from that very element, failing which, in each of the two legal orders, the factual matter of law also vanishes; the history of that man and that woman enters the area of law only through an event that one of the two legal orders treats as marriage while the other sees it as “an unforgivable sin”.¹⁵

15. The analogy with the example taken from domestic penal law is very close. Just as the violent death of a woman can be covered by a criminal accusation only if accompanied by particular circumstances of fact that justify one particular legal description to the exclusion of all others, with each of these descriptions being inseparable from antinomic facts, the living together of a Belgian man and a Moroccan woman has no meaning vis-à-vis the law, whatever be the strength of the amorous passion that has brought them together, until that passion has been given legal significance through the celebration of a civil marriage in Belgium, with the consequence that the evaluation of that fact is positive in one legal order and negative in the other.

16. Whereas all the facts of human life or social life present themselves to various scientific methods that authorize observations rightly or wrongly termed objective, the legal method carries out a prior selection of relevant facts. Relevance is brought in through a relationship established between a conceptual description of the situation and a legal concept. This is what has to be called the presence of law in the fact.

Here is an example to illustrate this statement, taken from the day-to-day experience of the legal practitioner. When people come to talk to an advocate, they will describe the situation for which they need legal aid. They will do so in their words, mixing in irrelevant details and useful information. If a woman complains of having being driven out of her dwelling, the legal practitioner must make her clarify the (legal) “title” whereby she occupied the room she is now being prevented from entering. Was she a tenant, a usufructuary or a janitor? Has she been driven out by a husband or by a concubine? Had she spent a few nights with a pick-up? Had she found refuge in an empty house with an unlocked door? These various situations, the diversity of which is almost inexhaustible, are all of equal interest to the psychologist, the sociologist or the mere observer of contemporary mores,

¹⁵ The phrase is taken from a ruling of the Court of Cassation of Tunisia (31 January 1966, *Revue tunisienne de droit*, 1968, 114), cited by Michel Taveme, *Le droit familial maghrébin* (Larcier, Bruxelles, 1981, no. 158). However, in connection with Tunisia, see *ibid.* no. 159.

but not to the lawyer. The lawyer is powerless unless he can identify among the complex of facts brought before him a pre-existing legal element that may constitute a possible basis for an action at law. However ignorant of law be the people consulting him, he has to have them identify the relevant factor, using concepts that necessarily have the nature of legal concepts. The notions of tenant, labour contract (where enjoyment of accommodation is part of the legal effects of such a contract), of spouse or, where appropriate, of concubine are a few examples. If the situation does not permit any of these descriptions, the practitioner consulted has to say that he is powerless.

It is not impossible for one of the relevant concepts to belong to a foreign legal system. Suffice it in this connection to mention the situation of a Moroccan woman compelled by her husband to leave the joint home after he has repudiated her. One of the problems facing the practitioner will then be to determine the effects of such a repudiation in the Belgian legal system. Here we again come to a question similar to the one previously encountered: Will the husband's unilateral act, which has in Moroccan law the effect of dissolving the marriage, have the same effect recognized in Belgium? The special feature of this situation by comparison with all those analyzed so far is that the law present within the fact is expressed using a concept taken from a foreign legal system and unknown to the *lex fori*.

CONCLUSION

17. What conclusions may one deduce from the admittedly too summary observations and ideas that have been presented? For the lawyer, fact and law do not belong to two different worlds, as if fact occupied the earthly space of crude factuality and law was accommodated in a celestial universe of pure normativity. At any rate, if it were so they would never be able to meet. Accordingly, some statements that continue to convey the spontaneous philosophy of lawyers must be contradicted or qualified. We have endeavoured to do so from two complementary perspectives.

The most revelatory, since it is also the most fundamental, is the second one. The "fact" to which legal practitioners refer is not a raw fact existing outside of any legal description. In order to be covered by a norm, a life situation must contain specific factors that can be designated only by a legal concept. Such a concept necessarily belongs to a legal system, and should several domestic legal systems claim to handle the life situation, the latter loses its apparent identity and splits up into as many conceptual entities as there are legal systems prepared to accommodate it. However, the relevant facts in each of these are not identical, and it is therefore no longer permissible to speak of a single life situation. The same approximate

character must be accepted in relation to the unity of the punishable act, the reason why the author, the person who has committed it, can be tried only once; since the judge exhausts his jurisdiction under all the legal descriptions that "the" fact can bear. Here too there are as many facts as there are legal descriptions, and the elements required by each of them are mutually exclusive. Not only does the claimed single fact have no real existence because it has necessarily had to be accompanied by specifications that link it exclusively to a single description; but in the absence of one of the latter, it would cease to be punishable.

Just as the legal relevance of a fact depends on the elements of law that can be picked out in it, the normative system is inseparable from the circumstances of fact that confer on it its positivity. Application of a norm by a judge is one of these circumstances; each particular juridical act by which the rule is actually applied to facts involves, at least implicitly, an act of interpretation. By bringing down the norm from the celestial generality where it seemed to have a non-factual nature, the judge makes it present on the earth of human beings, although not without acting upon the normative meaning it contains. This is indeed the scope of judicial interpretation, which, since it is binding only within the limits of a particular provision, does not for the future provide inspiration for the solution of similar cases. The example of the interpretive value of decisions given in a legal system other than the *lex fori* has been chosen because it gives relevance to the traditional statement, not yet totally outdated, that norms in force in another legal order are part of fact rather than of law. The expression "normative fact" sometimes used to designate the force of precedent in judicial interpretations¹⁶ gives suggestive expression to the nature of the legal precedent, but no less improperly than the terms "fact" or "law".

¹⁶ See esp. the work cited in note 2, nos. 71-74.

THE LAW AND ITS REALITY

PATRICK NERHOT

Legal dogmatics systematically treats the logical question of the distinction between fact and law as a purely technical question: the extent of control by appellate jurisdictions on the one hand, and that of the systematization of rules on the other, carried out on the basis of the notion of legal fact, most frequently contraposed to that of legal act; or else on the basis of a determination of the role of the judge and the parties in the judicial process, where the latter are supposed to bring out the facts for the judge to lay down the law.¹

Take, for instance, the question of the extent of control over lower courts by the Appeals Court. Since the Appeals Court is to exercise control over the legality of judicial decisions, doctrine has thought that it could consider a limit to this control as being laid down scientifically by appealing to the distinction between fact and law: errors of law would be referred to the Appeals Court, but not errors of fact. This dichotomy, which has the virtue of simplicity and clarity, has a relatively recent history in doctrine.

From the Enlightenment, the revolutionaries had retained two principles: that of national sovereignty and that of the separation of powers. The Declaration of the Rights of Man stated that the freedom of individuals could be restricted only by the law as an expression of the general will; and (recalling the Ancien Régime) that the judicial power could not limit that freedom, or in other words, take part in making law. The position of exegesis was that the law was a set of abstract general rules, and an order, the keystone of which was the written law. However, the enlargement of control by the Appeals Court from formal breach of the law to its misinterpretation and its application (made necessary by the elimination of summary

¹ *Dialectica* 59/60, 1961. *Le fait et le droit*, Volume 15 no. 3/4, Neuchâtel, Suisse, Du Griffon.

legislative procedure - a cumbersome and technically inefficient method), as well as the power conferred on it to impose its assessment over resistance by the trial judges, with an eye to the unification of positive law, led to the opposite result from what was sought: the setting up of a case law, the extent of which, it had been claimed, would be limited by positing this distinction between fact and law.

A study could be done on this: this procedure, presented as a purely technical question, involves another aspect not without interest as being intended as the basis of a major political organization, that aimed at warding off "government by judges". This distinction would thus invite us to inquire into the legal practices whereby power is organized and to pursue the historical evolution of that organization.² However, such research could not be done before undertaking a preliminary study of another underlying issue, without which an inquiry into what that legal practice represents would be much impoverished. The primary question is whether this distinction between fact and law is as simple as is claimed, and above all, what it actually says.

Rational legal systems - such as for instance Roman law - are all organized around a fundamental distinction between what is supposed to be, in a terminology widespread today, the order of the "given" and the order of the "constructed". A new legal epistemology was worked out in the 16th and 17th centuries:³ the law exists in the consciousness of man (and is therefore no longer the object of knowledge); it is constructed artificially by individuals. The law became an operational system of rules (the predominant idea being that of conceiving definitions, of classified types of law - Grotius) held to express laws of nature (positive law as based on natural law), a nature that was getting steadily farther away from the classical conception, the new conception being increasingly mechanistic. The sole mode of apprehending it was to be expressed by the notion of "fact"; this relationship to nature thus led to society's being objectivized in the way a fact is.

As long as one seeks to set up abstract scientific systems, such notions as "law" or "fact" seem easy to define. The real difficulty appears when this relationship has to be qualified, when these concepts have to be handled in a

² Marty, *La distinction du fait et du droit*, Thèse Université de Toulouse, Paris, Librairie du Recueil Sirey, 1929.

³ Voir, M. Villey, *La formation de la pensée juridique moderne - Cours d'histoire de la philosophie du droit*, Nouvelle édition corrigée, Paris Montchrétien, 1975, p. 347.

practical way.⁴ Thus Dalloz's general jurisprudence of 1847 says, in his article on the Court of Cassation: "The distinction between fact and law seems easy in theory, but in application gives rise to the most embarrassing doubts and raises the most metaphysical questions".

Legal dogmatics approaches these difficulties by splitting up the operation of the application of the law into three periods: the substantive finding of the facts, their subsumption under a legal concept, and the legal consequences deduced from these two operations; the first being a "judgement in fact",⁵ and the second two "judgements in law", and subject as such to appeal.

However, this method has never been totally satisfactory, for the simple reason that it is based on too many ambiguities, particularly because the situation that gives rise to application of a rule is constituted by a set of acts, circumstances, etc., that have to be picked out of an often complex and obscure context. At bottom, what this method tends principally to ignore is the way in which it proceeds in order to know, to apprehend, the context submitted to it.

Reducing this problem to a purely technical question is perhaps a bit hasty. Our way of knowing the law, which posits in particular that it is abstract and general, while the facts are concrete and particular, does permit the development of a legal argument (and the subsequent technical statements); but first of all it expresses a theory of legal knowledge. Legally, when we oppose fact and law, we argue as if the facts were all given, as if at bottom the difficulty consisted only in finding them (the function of legal science). The legal rule and the finding of a fact are supposed to be presented, fully elaborated, to an interpreter, who has only to fit them together in order to be able to lay down the law.

"The epistemological obstacle" is, as Atias well brings out,⁶ that it often happens that the jurist allows himself to be caught in the trap of realism, being always tempted to believe that the quality of a legal concept can be measured very exactly by its capacity to express reality. Regrettable as this

⁴ En ce sens, T. Kuhn, *The Structure of Scientific Revolutions*, Chicago University Press, Chicago, 1962.

⁵ A distinction which does not resolve all the difficulties, even technically. Take for instance the law on proof: there is a question of law (which therefore leads to a judgement in law), which is raised during establishment of the facts (and leads to a judgement in fact). The distinction is, then, hardly operational in this case.

⁶ C. Atias, *Epistémologie juridique*, Paris, P.U.F., 1985, p. 154.

confusion is, it is very widespread today, with all the harping on about how law should espouse only *the* facts (not just *some* facts - which is rather significant).

The ultimate goal of law should indeed be to embrace, as exactly as possible, all the forms of facts and their solution.⁷ This means that there are the world of facts (equated with reality) and the world of law, i.e., what has been worked at by reason in order to organize that reality. A perfect society would be one that rejected any misfit between reality and its legal organization; in other words one that could always juridically reflect any social novelty, immediately representable by the notion of facts.

In the traditional positivist conception, the law is perceived only as a condensation of the facts, and making law means reflecting reality:⁸ making the law means picking out from the raw materials of social relations the normative principle which, once crystallized, has in future to govern those relations. By constituting itself on the pattern of the methods employed in science, legal positivism thought it could assert the objectivity of its findings. Legal rationality would then be based on the capacity our legal system has to reflect reality, a reality knowledge of which is supposed to be immediate and complete. To bring this out a little more, we shall take a detour through the notion of legal fiction.

The legal fiction is presented as a concept that fails to recognize reality; it is considered that it is not concerned with inquiring into likelihood, but rather denies what is generally regarded as the reality of things. Let us quote GénY: "instead of contemplating things as they are, in the whole splendour of their truth, to reproduce their most varied aspects or penetrate their hidden arrangements, man takes pleasure in imagining ways of being that nature does not offer him".⁹ It is enough to introduce an element manifestly alien to the "strictly natural" representation of things into a classical concept in order for us to be in the presence of fiction.

⁷ The legislation dreamed of seems to become alien to the world of ideas. It must be laid down in fact, "embrace", "follows", "coincide with them". C. Atias, D. Linotte, *Le mythe de l'adaptation du droit au fait*, Chronique Dalloz, Dalloz 1977, p. 253.

⁸ F. Hayek, *Law, Legislation and Liberty: Rules and Order*, Routledge and Kegan Paul, London, 1979, p. 137.

⁹ F. GénY, *Science et technique en droit privé positif*, Four volumes, Paris, Sirey, 1930, volume III, p. 361.

It is at the cost of this illusion¹⁰ that legal statements are worked out. The most important thing for us to keep to here is that the notion of fiction implies the idea of a natural concept, in order to oppose to it a more or less arbitrarily manufactured concept. The legal fiction states explicitly that facts are denatured, but also implicitly, and principally, that there are concepts that are "real" as being the very expression of reality. Using Gény's vocabulary, there is a "given", reality, which jurists have to reflect scientifically.

The fiction is supposed to be an unscientific elaboration of law, as being a deformation of reality, an open denial of the real; some authors do not even hesitate to speak in terms of "conflict between the idea and the reality".¹¹ For legal positivism, the jurist's scientific work is supposed to consist in the observation, (knowledge and then understanding), of reality; a legal structure is supposed to be nothing more or less than a raw social fact put into legal form, and the fiction to be a procedure representing a grave anomaly vis-à-vis the truth of things.

The law would, then, be a general, abstract construction emerging from a natural order, from a "given", that is immediately perceptible, and the norm would be a pure product of that given, deriving completely therefrom. The idea is rejected that the law relates to situations or institutions whose elements are linked by teleological links. And if one can in fact speak of a "given", a common denominator of all societies, namely the mental and physical structure of our species, the legislator is not conditioned by it, for the simple reason that he is not directly confronted with it.¹²

This distinction will be used to justify another distinction between "positive law" and "legal science", the latter being aimed at raising positive law to the highest stage, to the point of coinciding with reality. What we shall however be led to find is that positive law and legal science, far from being separate, on the contrary express a unity, as abstractions that unceasingly refer to each other.

Far from positing this dichotomy between the given and the construct, we have to reconsider this idea of given, by asking how we know the facts that claim to express reality and seem to be adequately represented by the theoretical model. Let us, moreover, note with interest that however obvious

¹⁰ Which, we stress, is extremely frequent in our legal systems.

¹¹ Yssa-Sayeg, J., *Les fictions en droit privé*, Thèse Université de Dakar, 1968, p. 2.

¹² En ce sens, C. Atias, *Epistémologie juridique*, *op. cit.*, p. 177.

the notion of fact might seem to be, we find a multiplicity of methods of gathering facts.¹³

We know that in science experiment is identified with the facts, since regarding an experiment as a fact amounts to asserting its objectivity; in other words, any observer whatever may carry it out. For Comte,¹⁴ “only facts need to be considered, since they do not depend on who is observing them. Fidelity to reality, without which there could be no science, is itself possible only by confining the sciences to the determination of laws”. The latter are held to be derived from the observation of facts. Objectivity, as guarantor of the success of the sciences, assumes that propositions can be the object of experimental verification; the facts (reality) can be symbolized directly.

Returning, then, to our field, the rational realization of law implies the possibility of conceiving of reality; the rational legal order is possible only if the natural is itself regarded as a rational order. Motulsky,¹⁵ before expounding his method, states that “the jurist conceives of the legal community as *the juxtaposition of individual spheres* (our emphasis) in which the law shuts up the members of the collectivity ... these spheres by definition fill the whole space of the collectivity’s legal life; no one can emerge from their own circle without entering someone else’s area ...”.

Nominalism is at the very basis of the method. It is still more interesting to observe how the faithful reflection of nature by legal science is asserted conceptually: nature is made up of individual beings, and man is the centre of nature, sovereign of his territory. The whole legal system is supposed to be built up on this original truth; which leads Motulsky to the following remark in the passage already cited: “... physical persons and legal persons, so improperly called moral persons...”; we shall come back later to this legal perception of reality and the way that perception is handled.¹⁶

Positive legal philosophy refers back to the philosophy of nature offered us by the classical philosophy of science. Physics, from the 17th century

¹³ W. O’Neil, *Fact and Theory: An Aspect of the Philosophy of Science*, Sydney University Press, Sydney, 1969, p. 124.

¹⁴ A. Comte, *Cours de philosophie positive*, éd. 1974, Vrin, p. 31.

¹⁵ H. Motulsky, *Principes d’une réalisation méthodique du droit privé*, Paris, Sirey, 1948, p. 26.

¹⁶ On these distinctions, see e.g., Amselek P., *Méthode phénoménologique du droit*, Paris LGDJ, 1964, p. 86.

onward, solely sought laws. Reality was made subject to the "atomistic" logic of scientific thought, and split up into non-complex isolated fragments. Motulsky's text just cited is a striking illustration of this passage of the method of natural science into legal science. Logic has thus to operate perfectly on propositions isolated from each other to develop particular ways of "boarding" reality,¹⁷ fragment by fragment. The real becomes a logical idea. The elaboration of a rational legal order and the perception of nature constitute the same operation, within which it is impossible to distinguish what is supposed to be the order of the "given" and what is that of the construct. The "given", as we shall see, is the "given of a construct".

What seems to us the most fundamental thing to bear in mind here is that, in its process of rationalization, the rule can be abstract and general only because *the facts it is intended to regulate can be reduced to a common type*. In other words, the distinction drawn between nature and science is the very essence of the rationalist method; far from imposing itself naturally on scientific method, it is the outcome of it. For primitive law or magical law, etc., questions of fact do not exist; nor do those of law in their technical or rational aspects. The distinction between fact and law can only appear once primitive legal systems give way to rational systems (Max Weber).

The distinction between fact and law is the very product of legal rationality, which means that the norm is most certainly not, as positivist doctrine regards it, the product of the actual situation; this distinction is the heart of legal rationality. The fact is not external to that rationality, but internal to it. For this reason, we shall say that the delimitation of the legal sphere is definitely not posited in terms of "frontiers" laid down from outside which objectively circumscribe the legal sphere. To say that facts can be independent of a theory underlying them, that a limit can objectively be set to the legal sphere, would amount to saying that the method of reasoning was objective in itself. Finally, we shall say that the foundation of law is the law itself and therefore that law presupposes law. Legal thought, when it claims to be positive, posits facts as all given, as "always already" present, constituted, independent of the discipline that claims to found them. This really is a fiction. As we shall see, a fact is the result of a conceptualization that puts together a set of elements separated from their context.

Let us first of all note that the term "finding the facts", used to describe the operation carried out by the judge when he works out his judgement on the basis of situations brought before him, is an unfortunate one. The term, a pure product of positive philosophy, is a rather poor representation, in our

¹⁷ E. Morin, *La Méthode, II, La vie de la vie*, Paris, Seuil, 1980, p. 195.

view, of the operation carried out by the judge. He does not “find” anything in the sense that the expression “finding of fact” would suggest; the judge decides. He decides on the basis of situations as put before him by the parties and brought by them into relationship with legal statements. He thus decides on the basis of the relationship of identity felt by the parties between their situation and what they regard as being covered by the legal text they have adopted, and he decides as to the legal consequence argued for by the parties of the identity relationship that they have previously posited. He intervenes, thus, in respect of an identity relationship and of a causality relationship; if he is brought to find anything, he does so at the very centre of the intellectual operation whereby he assesses these relationships brought before him by the parties.

We are here at the very heart of the life of the law; the legal mechanisms whereby the identity and causality relationships are assessed is part of a constantly changing story, in which Clause 2 of Art. 12 of the French New Code of Civil Procedure is the latest outcome.¹⁸ Legal positivism is not right in stating that this provision means that the law is deduced from facts since, as the text itself states, the facts in question are *qualified* ones: the nature of this operation is passed over in silence.

The judge’s decision is not a pure and simple application of the rules it refers to, but an assessment of the situations presented by the parties. This is, quite obviously, within the framework that these rules set forth, and in that sense the decision is bound up with facts, but, and this is an important point, the latter cannot be regarded as either a fragment of reality or even as the manifestation of something underlying it.¹⁹ The object of the human sciences in general and of legal science in particular is a representation covering a diversity of experience with a view to “putting it in order” and thus providing and organizing a rational knowledge of reality.

This object is manifested only indirectly through knowledge, through language, through practices²⁰ which are only one aspect of reality, and cannot be recognized as such except by someone who already knows reality

¹⁸ Art. 12.2 of the New French Code of Civil Procedure says that the judge “must supply or restore the proper designation of the facts and acts at dispute, without being bound by the description given by the parties”.

¹⁹ Voir N. Goodman, “The Fabrication of Facts” in M. Krausz and J.W. Weiland (eds), *Relativism: Cognitive and Moral*, Notre Dame University, Notre Dame, 1982, p. 18.

²⁰ T. Kuhn, *The Structure of Scientific Revolutions*, *op. cit.*

in a particular way. The reading of all these signs thus presupposes prior knowledge and an interpretation of the "given" in its light.²¹

We were already able to say that the situation that gives rise to the application of a legal rule was constituted by a set of acts or circumstances extracted from a most often complicated context. We may now look at the way this extraction takes place: How are the facts gathered in legal science? Let us remain with the example of the judge.

This basis on which the judge builds up his judgement, far from imposing itself by itself, is on the contrary determined by *the rule under which the facts have to be brought*.²² It is in fact such rules that supply the grid whereby on the one hand facts are chosen and on the other their meaning(s) are read.

The organization of facts that allows the application of a rule is supported by a prior interpretation, without which these facts have no sense whatever. This prior interpretation is supplied by the legal rule itself, and is in no way an objective datum, a pure reflection of reality. It is a commonplace today to say that the fact is a pure creation; that the "raw" fact does not exist. The choice of givens in a particular situation made by the judge is determined by the norm in terms of which they are judged.

L. Husson²³ reminds us that "a single system of positive law will offer those concerned a choice of various grids, and a single fact may display opposite characteristics of lawfulness, depending on the grid applied to it". The advocate's skill consists, after all, in a particular choice of elements, of "facts", to make one rule applicable rather than another. The judge decides within limits traced out for him by the conclusions exchanged between the parties; Motulsky even considered that the judge has no right to regard as false what both parties declare as true.²⁴

The legal rule enters not merely in order to decide which treatment to apply in order to establish facts, but first of all to trace out the background against which these facts have to be defined and analysed, in order for it to be

²¹ P. Watzlawick, *How Real is Real?, Communication, Disinformation, Confusion*, New York, Random House, 1976.

²² L. Husson, *Nouvelles études sur la pensée juridique*, Paris, Dalloz, 1974, p. 125.

²³ L. Husson, *op. cit.*, p. 259.

²⁴ H. Motulski, *Principes d'une réalisation méthodique du droit privé*, *op. cit.*, p. 81. The new Article 12 we cited above has now settled this question.

applied. The argumentation underlying the constitution of the parties' cases and the judgement that the judge delivers is teleological. Thinking about the goal they wish to attain, the parties pick out the legal rules necessary to attain that goal (at least, those they imagine to be so) and seek to present facts liable to make these rules operational. For his part, the judge picks out the rules necessary to secure the goal desired by the parties, and then decides whether the facts presented to him are indeed compatible with the rules chosen.

In his *Pure Theory of Law*, Kelsen had already shown that no norm could be deduced from a "raw" fact.²⁵ Speaking legally, no fact can be stated without reference to a rule. The fact, as legal science understands it, is in no way a given that imposes itself by itself, external to legal science. Quite the contrary, legal science speaks of "conclusive" facts (i.e., those able to convince the judge), of "pertinent" facts (useful in the matter, but no more), and conversely of "inconclusive" or "non-pertinent" facts, i.e., facts which *do not exist for the law* "having regard to the circumstances of the case". *Frustra probatur quod probatum non relevat*.

This barrier alleged to exist between fact and law can evidently not appear other than as badly traced, fugitive, "raising problems of a metaphysical nature". By definition and in consequence of what we have just said, the law takes a grip on the fact and, far from being separate, facts of law constitute a unity, or better, a totality.

They constitute a totality because the law is in no way attached to the "materiality" of the facts, and various events that it considers, but to the meaning they have within the legal system itself. This meaning is in no way bound up with the elementary events, taken in isolation, that constitute them (which would mean joining with the "atomism" of the natural sciences to which we alluded); it results from the whole of them as a construct under the rules.

In saying this, we are doing no more than describing daily legal practice, as may be illustrated by repeating an example from L. Husson:²⁶ "When case law and doctrine have to evaluate the causal link required by Art. 1382 in connection with damage and the fact to which it is attributed, they do not take into consideration all the relations that may substantively be established between the bringing about of this damage and the very varied factors that have had to concur in order for it to be produced; they consider only those

²⁵ Kelsen, *Pure Theory of Law*, *op. cit.*

²⁶ L. Husson, *Nouvelles études sur la pensée juridique*, *op. cit.*, p. 220.

which in their eyes imply non-observance of a duty" Let us go on to say that this duty is itself defined by a set of rules.

We have said why in our view the expression "finding the facts" used to describe the judge's function is an unfortunate one. The fact is not meaningful in itself, but only when bound up with and integrated into a set of practices that give it meaning. To reject this expression amounts to rendering the legal epistemology it emerged from suspect. The term "finding the facts" is located within a general conception of law where the judge is regarded as finding a reality (and therefore that reality is "given"), that he goes on to determine its legal nature (and thus that the jurist's scientific work consists in reflecting the statements of nature as faithfully as possible) in order finally to give these facts legal effect (hence the idea, here too, that the norm is a pure product of the factual situation).

Far from finding the facts in the first place, the judge, as we said, first seeks the conclusion he wishes to reach.²⁷ Legal reasoning is, in this sense, teleological. Once the goal is identified (and hence the possible legal rule identified), the judge must think what *typical* situation justifies the application of this rule. Here, the legal apparatus may become extremely complex.

The appeal to experts, for instance, has the goal of conceiving of this situation. Thus, the scientific process whereby legal science reflects reality is accomplished by a detour through other social sciences (organized by legal science). We are thinking here, for instance, of the role of economic science in the drawing up of an economic law. What is being worked out in this phase is the very meaning to be attributed to a legal rule. But the mechanism that we describe for legal science, the meaning of the legal text, will clearly be repeated in the same way for the other social sciences. The theoretical model posited by, for instance, economics refers to ideal facts.

Motulsky spoke here of "presupposition".²⁸ This would be the model worked out on the basis of the rule but not yet on that of the various events argued by the parties. The facts adopted by the judge will be those that seem to him to be similar to those in the model derived from the rule (and here we again find the notions of conclusive, pertinent, etc., facts). By this mediation, the law constructs reality.

²⁷ H. Motulsky, *Principes d'une réalisation méthodique du droit privé*, op. cit., pp. 155-156.

²⁸ H. Motulsky, *ibid.*

Reality is constructed and defined every time. Once this operation is accomplished, the judge then proceeds to a *comparison* between the type situation model and the facts of the case presented by the parties; in so doing the notions of conclusive, pertinent, etc., facts are thus created. The meaning of a legal text would, then, be located in this exchange between a judge abstractly positing facts once the rule that might be applied to the case has been determined, and the parties who, on the basis of different events, have imagined the rule that legitimates their acts and subsequently picked out facts that can support their claim to the expected right. In all this there is no question of "finding facts". The point is to compare two types of facts, which are the resultant of *a priori* knowledge of legal rules.

The operation that consists in "finding facts" does indeed exist, but has in our view a quite different meaning from the one traditionally attributed to it. In the parties' allegations, since the applicable rule (and hence the law, consecutive to it) is *justified* by a set of elements (called facts), it is up to a party that wishes to deny its opponent's claim to dispute the elements justifying the application of the rule. And it is because facts justifying application of a rule will be disputed that the judge has to find the facts raised in the case.²⁹

Perhaps an objection might be raised here that a number of social practices have preceded the existence of legal rules; that in other words facts preceded law (and therefore that law emerged from fact). This "sociological view" ought not to seem to contradict what we are trying to show; only the conclusion is disputable. We would even say that denying this view would amount to saying no less than that the law is a "closed system". That would be a pure absurdity; by definition, a "system" in the social sciences has to be "open". It would perhaps be appropriate to distinguish the "facts" on the basis of which the legislator works from "facts" brought out in the context of litigation (hermeneutical approach).

Take for instance penal law. By the principle of the legality of offences and penalties, we have a sort of "discontinuity" of criminal law, since the law, through this principle, is posited as the exception, and the absence of legal relations as being the rule. But clearly nothing prevents a particular social situation not apprehended by the penal law at a particular moment from being so later. But in this case is it not more accurate to say that a new penalty has created a new type of crime, and that therefore it is indeed law that creates the facts and that the foundation of law is the law itself? Man is not a thief by nature; he is a thief in the light of the law.

²⁹ H. Motulsky, *ibid.*

A number of social practices do not, by definition and in consequence of what we have said, constitute the object of any involvement by the law. Only those events are taken into consideration that allow the demanding of a right or the operation of rules. Carbonnier³⁰ had already noted this phenomenon when he spoke of the "self-neutralization" of law. It is in fact through its own needs that the law manages to annihilate itself. The need for proof, for instance, puts everything that cannot be proved outside the law.³¹ Just as legal rules can be the source of new social practices, as we observe daily, and this is the very goal of law, so social practices can be the origin of new legal rules. But saying that social practices are at the origin of new legal rules (as was the case for labour law, environmental law, economic law, etc.), does not imply that the law emerged from the fact. It means, in our view, that situations devoid of legal effect had such effect attributed to them; and therefore that situations regarded as simple facts, non-existent for legal science, thenceforth came to form part of the legal order.

There is no opposition between fact and law, but an opposition between social practices that are non-existent in the eyes of the law and a situation for which legal effect has been imagined. We have seen how social practices were not purely and simply the situations that the law constitutes. This distinction consists in counterposing to the unqualified fact those facts which through being treated as legal become bound up with legal effects; these facts are themselves a "legal situation".³²

The object of legal rationality is the relationship between these two situations, and to positive legal thinking which says that this relationship is in part a function of the facts and in part immediate, we shall say first of all that the relationship is mediated, and secondly that it is not directly a function of the facts. Positive thought says that the meaning of the relationship is immanent within the facts themselves. In the physical sciences, far from demonstrating the existence of the natural order, one constantly verifies through facts the partial orders expressed by the law and theories.³³ The facts

³⁰ J. Carbonnier, *Flexible droit: Textes pour une sociologie du droit sans rigueur*, 3ème édition, LGDJ, 1976, p. 26.

³¹ J. Carbonnier, *op. cit.*, p. 28.

³² F. Rigaux, *La nature du contrôle de la Cour de Cassation*, Bruxelles, Bruylant, 1966, p. 85.

³³ T. Kuhn, *op. cit.*

are therefore inseparable from the theories; and this is the same in the social sciences.

But while for the natural sciences the interpretation of data consists in fitting them in with other data of the same order,³⁴ for the human sciences, on the contrary, interpreting data consists in linking them to a "reality" of a different order. We have seen this notion of reality worked out by the law, and we have shown that the notion of fact, which seems to be identified with that of the real, is two-fold. The fact is sometimes what is gathered, sometimes the reality of which it is the manifestation and to which interpretation allows us to ascend.³⁵

Let us once again cite Motulsky. The phrase "the defendant is the employer of the plaintiff" has a twofold content; on the one hand, it closes the analysis of the circumstances of the case and has the nature of a finding of facts; "...but at the same time it implies the conclusion that if a comparison is made between facts and the elements that generate the law invoked, it does appear that the legal notion of employer is reflected in the circumstances of the case: this conclusion is part of law".³⁶

What a discipline has to do is to set up concepts specific to it; but this is equally true of the data it selects through these concepts. Since they do not have the same concepts, the jurist's facts are not those of the sociologist for instance.³⁷ We may likewise say that within a discipline subdisciplines arise, using different concepts. For legal science, for instance, let us think of the birth of labour law which, from its beginning, has been marked off from the other subdiscipline, namely civil law, by forging its own concepts and consequently its own "reality".³⁸

In his remarkable study on the Welfare State, an analysis of the transition from "liberal" State to "social" State, F. Ewald³⁹ shows that any judgement

³⁴ J. Parain-Vial, *La nature du fait dans les sciences humaines*, PUF, 1966, p. 11.

³⁵ P. Nerhot, "Interpretation in Legal Science, this volume", Part II, pp. ????

³⁶ H. Motulsky, *op. cit.*, p. 157.

³⁷ W. O'Neil, *Fact and Theory*, *op. cit.*, p. 177.

³⁸ Passage from one to the other, far from being impossible, is used very frequently, because by changing discipline and hence concepts, one secures other facts, (another reality) more pertinent to the goal one is seeking.

³⁹ F. Ewald, *l'Etat providence*, Paris, Grasset, 1986, p. 41.

expresses a type of rationality, and that facts will be taken into consideration or not as a function of it: "What changes in the 1830s is that facts till then excluded from law come to have a place in it, to be recognized in it and to be associated with a sanction".⁴⁰ Nothing authorizes idealism, for which reality amounts to the sum of the facts, to regard givens as determined in the same way as things, with both equally able to be relied on by the laws, because before they take on meaning they must, as we have seen, be interpreted.

This primary operation, interpretation, has to do in legal science with what is termed description (qualification): the operation that defines reality. As we know, the role of the judge, who has not been a witness to the situation he has to define, consists in interpreting legal rules. He therefore arrives at cognizance of the facts through rules, or in other words takes cognizance of the situation brought before him using methods authorized by the law.

We have seen that the judge's investigation into the facts is organized, limited, by principles of procedure; moreover, the burden of proof, the hierarchy of means of proof set down by the law, the degree of probative force of the elements invoked, etc., are questions of law raised by the law itself, that is, by the legal treatment of the facts. We were thus able to say that a fact can be noted only in terms of a goal that is sought; that a fact is the result of an operation whereby a particular element is taken out, isolated from a context of its own, to be placed in another context that gives it a particular meaning.

At the same time, however, as Husson has noted,⁴¹ this goal appears only "in the presence of facts and to an extent that it guides their analysis". A legal solution is the outcome of a two-fold pressure, of an event and of the goal sought for in terms of the representation we historically have of each. History, as Duby tells us, is "a constrained dream"; we could use this formula for the operation of description carried out by the judge, and call the fact the outcome of a "plot".⁴² In the same way, the goal sought takes form only "by being reflected in a rule, and the action of that rule, with its manifold implications, transforms the situation that posits it, poses new problems and raises new claims".⁴³

⁴⁰ F. Ewald, *op. cit.* p. 103.

⁴¹ L. Husson, *op. cit.*, p. 167.

⁴² P. Veyne, *Comment on écrit l'histoire* ; suivi de : Foucault révolutionne l'histoire, Paris, Seuil 1978, p. 33.

⁴³ L. Husson, *op. cit.*, p. 168.

Legal description contributes to both *creating and modifying a reality* that it is its object to found. For a fact to be used in objective knowledge, we have seen that it must be interpreted, and have shown that it is the legal rule itself that supplies the keys for this conceptual interpretation. The finding of facts to which legal reasoning is applied is not independent of the evaluation that motivates and orients the intervention of the law. For this reason, legal truth is neither absolute nor objective; it consists only in the judge's belief, formed according to legal bases.⁴⁴

Along the same lines, it would in our view be erroneous to conceive of legal proof as the specification of a particular situation for which an explanation is supplied. Legal proof is the *justification* brought to an argument within which the rules were chosen and facts, acts, and various events selected with a view to attaining a particular goal. All that can be the object of proof, then, we said, is the circumstances, which are to be regarded in the same way as the judge does in applying the chosen rule with an eye to the goal being pursued.

If doctrine runs into blind alleys in its theory of description, this is because it posits that there exist *a priori* natural frontiers between law and social reality, which are no longer there when it comes to appeals in positive law. Here, far from being separate, fact and law are organically united, constituting what legal science calls "grounds" ("base légale"). Since there is no room for the concrete in legal argumentation, the question of the legal description raises the problem of supplying and giving the nature of the "grounds" that a judge has invoked in his argumentation. Let us now set up a few landmarks.

The grounds may have three types of defect: they may be non-existent (when Art. 7 of the law of 21 April 1810 would apply, for "lack of grounds"); inexact (when there would be "breach of the *statute*" on the basis of the same text); or insufficient (an opening worked out in case law; here there would be "lack of legal basis").

We said at the outset that before approaching the question of the distinction between fact and law in order to determine the extent of competence of the highest court, we would first have to think about the very principle of that distinction. We may now, perhaps, say something on this criterion of competence.

With our hypothesis we see in what way it is wrong to say that the highest court is competent only for questions of law; more exactly, if by the

⁴⁴ H. Motulski, *op. cit.*, p. 85.

criterion of the distinction between fact and law it is intended to demonstrate that the highest court can only deal with law, then we would say that this demonstration can never be given. In fact, we have shown at length that any description raises a legal problem, and therefore that the highest court of appeal ought to be competent for any decision given by lower courts. What, then, would be the criterion?

Art. 7 of the law of 20 April 1810 states explicitly that the Court of Cassation is entirely competent to assess the facts, which is in line with what we have endeavoured to show throughout this study. What we have said is that the investigation carried out by the judge is a question of law raised by the legal treatment of the fact, but also that the goal sought appeared only in the presence of facts, to the extent that it guided their analysis. In other words, the interpretation brings ideal facts, regarded *a priori* as necessary by the judge in order for such-and-such a rule to be actuated, into contact with a set of elements put forward by the parties with a view to having the right that that rule confers recognized. The whole of this operation is essentially that of law, and law alone, and the Supreme Court is therefore competent to exercise control over all its aspects. In exercising this control, it will talk about inexact, non-existent or insufficient facts.

By contrast, the area where the Supreme Court regards itself as incompetent is where one party disputes the veracity of facts alleged by the other: "the facts of the plot". This dispute obliges the lower court judge to verify the veracity before proceeding to the operation of description. Exclusive competence is given over to the trial judges. The Supreme Court intervenes only in the comparison phase we described above, in which (legal) meaning is manufactured out of (legal) meaninglessness.

Going back to the example of the legal fiction, which allowed us to highlight the ontology of the *real* underlying the distinction between fact and law: in consequence of what we have said throughout this article on this distinction, the fiction is not to be perceived as a negation of reality; it is in no way "an anomaly with regard to the truth of things". At bottom, if the legal system produces legal reality, it would be more correct to regard the legal system as a whole as a fiction from the viewpoint of the other social sciences.

The legal procedures traditionally meant in speaking of legal fictions do not express a relationship between the legal sphere and something outside ("reality", say); what these procedures express is non-knowledge, let us say, of legal reality, or putting it differently, a non-logical relationship inside the legal sphere itself, to allow "internal communication" in the legal sphere to continue to function. Take for instance the legal notion of "moral person": there the fiction is not in relation to reality external to the legal system,

such as the physical reality of an individual, but in relation to the legal reality, which is that of the legal notion of personality of individuals.

Gény, for whom it is for the jurist to "bring social reality into law", gave the question "why the fiction?" the following answer: "this is a why that really seems to me unfathomable".⁴⁵ This technique of fiction, generally perceived as among the most shocking, and condemned by what Gény calls the "given",⁴⁶ must inevitably disappear.⁴⁷

The "natural person", which was, and still is for some tendencies in legal thought, the "sovereign and conscious" individual, had, and has, as long as the natural law represented by the idea of legal subject lasts, autonomy of will; for the school of *jus naturalis*, *jus gentium*, legal rules are the work of individual wills (or of the general will) and sovereignly translate into contracts or law the *a priori* requirements of Universal Reason.

This natural person was spectacularly denied by the idea of moral personality. In our view, however, it will take a lot for this procedure ever to disappear. The error consists in calling what is construct "given"⁴⁸, and moral personality is nothing but a deepening of the notions of law contained in the legal notion of personality; we reply thereby to the question that Gény, in his initial hypothesis, regarded as inconceivable.

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⁴⁵ Gény, *Science et Technique en droit privé positif*, *op. cit.*, vol. III, p. 378.

⁴⁶ F. Gény, *op. cit.*, p. 396.

⁴⁷ See Association Henri Capitant pour la culture juridique française. *Le problème des fictions en droit civil*, Paris, Dalloz, 1948. Also, L. Fuller, *Legal Fictions*, Stanford University Press, 1967.

⁴⁸ Gény, volume III, *op. cit.* p. 418, note 4 had another notion of what is "natural" and said in connection with the will, "by nature autonomous": "I believe that it is the attitude that is necessary in regard to fictions of the will, which under the pretext of applying it, falsify the legitimate action of the principle of autonomy".

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PART 1

THE LAW AND ITS REALITY

SECTION II: STATING THE LAW

ON RATIONAL ACCEPTABILITY. SOME REMARKS ON LEGAL JUSTIFICATION

AULIS AARNIO

1. GENERAL REMARKS

Legal dogmatics is one of the *several subtypes* of legal science. The other ones are, for example, legal history, comparative study of law and legal sociology. Of the subtypes, legal dogmatics is the oldest: traditionally, it has been defined as follows. It consists of two types of activities: interpretation of legal texts, especially the text of law, and systematization of legal norms. In the following, the focus of the analysis will be solely the interpretive task of legal dogmatics. Although this limitation has been made, interpretation is internally related in several ways to systematization. The most important relation is the "feedback" phenomenon: the method of systematizing norms (systematizing theory) affects the contents of the interpretation.¹

The need to interpret legal material is familiar to everybody who has worked with the problems of ordinary language. *Legal texts* are only a special part of this language and therefore all difficulties in interpreting common linguistic practices are necessarily involved in legal interpretation.² One of the most difficult problems is the fuzziness of the language.³ Very often this means that the legal texts are ambiguous or there are other kinds of obscurities in the text. Only the problem of ambiguity will be dealt with in this paper. In

¹ A. Aarnio., *Denkweisen der Rechtswissenschaft*, 1979, p. 37.

² See e.g., A. Aarnio., *On legal Reasoning*, 1976, p. 266.

³ See about this concept J. Wróblewski., "The Problem of Meaning of the Legal Norm", in *Meaning and Truth in Judicial Decision* (ed. by A. Aarnio), 1983, p. 1.

order to clarify the problems that are caused by ambiguity the so-called "*hard-case*" situation can be chosen as an example.

Suppose a law text, *L*, has four alternative interpretations, *I*₁- *I*₄. Let us call them *semantically* possible ones. They may be interpretations according to the ordinary use of language, or to a special use of that language. The essential feature, however, is that those meanings can, in principle, be picked out only by using a method of non-legal linguistic interpretation. For a judge, and for a legal scholar too, this set of alternatives is, naturally, not a satisfying end to the interpretation procedure. He also has to make a choice among those alternatives, all of which are semantically possible. His decision has to be a *legal* one, too. When making this choice, he uses an established pattern of legal interpretation. Let us assume that by means of this procedure a scholar (or a judge) has found two of the semantically possible interpretations to be *legally possible* as well.

They can be called *I*₁ and *I*₂. Specifically for the judge, the final step, the choice between these two legally possible interpretations, is a part of his role. A judge is under the obligation to give only one answer to each legal problem that has been put to trial. This final step is, from the point of view of legal interpretation, the crucial one. This step attaches the "right" answer to the problem at issue.

A legal scholar is, *in this respect only*, in an analogous situation to that of the judge. In the adjudication the decision-maker uses "the societal power" and he has an obligation to solve every problem that is on trial. The judge therefore has a very authoritative position. On the other hand, the adjudication deals always with two questions: the fact problem and the norm problem. Solving problems of fact requires the judge to deliberate upon evidence and determine what it proves. The scholar does not have any position of power comparable to that of the judge. Nor does he have an obligation to solve legal problems. Nor do legal dogmatics deal with concrete cases. All these differences are, however, differences of the *societal function* of, on the one hand, adjudication and, on the other hand, scholarly work. As far as legal *interpretation* of texts is concerned, the similarities are greater than the differences. The interpretive side of adjudication and scholarly interpretation are of much the same *type*. One can also speak of the epistemological similarities. The judge and the scholar both use the same methodology in interpreting legal materials. If they do not use the same type of arguments and the same rules of interpretation, they do not reach the same type of results. In this regard, it is a necessary feature in law that every interpretation is bound to the same epistemological structure. Therefore, all that can be said of the structure of interpretation in adjudication can also be applied to interpretation in legal dogmatics.

2. THE STRUCTURE OF LEGAL INTERPRETATION AS A JUSTIFICATION PROCEDURE

The central problem in legal interpretation is how to justify the choice among legally possible alternatives. Having achieved this task, the scholar gives an answer to the question: Why is this and not some other interpretation the proper one? The general form of justificatory statements is as follows:

Pj: "On the grounds G_i the proper interpretation
for \underline{L}_i is \underline{I}_i "

As far as the type and the structure of justification are concerned, two viewpoints have to be kept distinct, i.e. that internal and that external justification. From a slightly different point of view, the internal justification can be called contextually sufficient (legal) justification.⁴ It is contextually sufficient because it deals only with material which is accepted as legal and which can be used in this very context of interpretation. The interpreter does not pose the question why this type of source of law must, should or can be used or why these rules of interpretation are to be followed. He simply justifies the interpretation in the same way as jurists normally put forward their arguments. In other words, the interpreter makes his moves within the given legal framework.⁵

According to Jerzy Wróblewski, the scheme of the internal justification can be of the following form :

$$\begin{array}{l} G_1 \dots G_n \\ D_1 \dots D_n \\ V_1 \dots V_n \end{array}$$

Result : \underline{I}_i

In the scheme, " \underline{G} " means the material premises for the justified stand-point \underline{I}_i (the sources of law), the symbol "D" refers to the directives (rules or

⁴ A. Peczenik., *Grundlagen der juristischen Argumentation*, 1983, p.101.

⁵ A. Peczenik., *The Basis of Legal Justification*, 1983, p. 1.

principles) of legal interpretation accepted in the legal community; and the letter "V" is a symbol for the values needed in evaluating the grounds G₁ ... G_n and/or the use of the interpretive rules D₁... D_n. What is essential in the scheme is the *closed nature* of the inference; it is closed in the sense that the conclusion (I_i) can be drawn purely deductively from the premises. For this purpose, the scheme can always be put in the form of a syllogism. The scheme is therefore suitable only for a *posteriori* rationalization of the interpretation procedure. The precondition for this kind of inference is always a given set of starting points. That is also the reason why the internal justification does not describe the whole structure of practical legal reasoning.⁶

The real problem for a judge, and for a scholar too, is to find out *the premises*. This Wróblewski calls the external justification.⁷ In this the question deals with the validity of the premises and the rules of inference. According to Wróblewski, they are dependent on the standards by which validity is evaluated. One can also say that an external justification ultimately depends on the norms and values to which one binds oneself in the justification.

The procedure of external justification - legal discourse as a form of general practical discourse - can be described in the terms of internal and external justification as follows. Let us take an example. The structure L_i expresses the norm: "If F₁, then G₁ ought to be". A legal scholar A has put his opinion (standpoint) concerning the statute L_i in the form: in the case of f, then G₁ ought to be. Let us call this standpoint the interpretation I_i. A natural question in this situation is as follows: *Why* ought the consequence G₁ be connected only to the fact f ? The scholar A may answer that the term "F₁" in the law text means "f" and only this. Hence, A has given the first-level argument in his justification. This part of reasoning can be written *ex post* in the form of a syllogism:

⁶ See J. Wróblewski, "Justification of Legal Decisions", in *Meaning and Truth in Judicial Decision*, p. 49, and especially p. 56.

⁷ J. Wróblewski, *op. cit.*, p. 57.

Syllogism I

PR₁: The law text L_i says: if F_1 , then G_1 ought to be

PR₂: $\in F_1$

C: if f , then G_1 ought to be

The premise PR_1 connects the text L_i to its interpretation I_1 . Therefore, the first premise (PR_1) has in this syllogism the role of the first-level argument, i.e. the opening of a justification procedure. The addressee B can, however, put the question: Why just $f \in F_1$? Why not e.g. $f \in F_1$? In order to answer this question, A has to add to his arguments by giving a supporting ground for the statement " $f \in F_1$ ". This stage of reasoning can again be put in a syllogistic form:

Syllogism II

PR₁: If the *travaux préparatoires* say
 " $f \in F_1$ " in the case of L_i , then the
 proper interpretation of L_i is I_1 ,
 i.e. "if f , then G_1 ought to be"

PR₂: The *travaux préparatoires* say " $f \in F_1$ "

C: The proper interpretation is: $f \in F_1$

In the everyday practice of legal dogmatics the conclusion C often has the role of an independent argument. A scholar simply refers to the legislative history of the statute. However, the basis of this argument is a syllogism such as the one referred to above. In other words, there is always an internal justification for every step in the chain of arguments. In order to be precise one must therefore describe syllogism II itself as a second-level argument. In the same way, arguments supporting a certain argument can be written in the form of a syllogism. Internal and external justification are, in this sense, interrelated.⁸ The diagram may thus be put also in the following form:

⁸ A. Aamio, *The Rational as Reasonable*, 1986, p. 121.

L ₁	
I ₁	I ₂
Syllogism I	?
Analysis of the terms	c ₁
Syllogism II	c ₂
Syllogism III	c ₃
Supporting of an argument (Syllogism IV)	—
Syllogism V	—
—	—

The standards of rationality (in general) and the traditional standards of legal interpretation point out how a certain individual syllogism can be formulated. The rules of syllogistic logic define the form of inference and the standards of legal interpretation, for instance, that customary law must be used as an argument in certain conditions.⁹

Legal interpretation is not, however, *only* syllogistic in nature. One cannot identify any rules accepted by the legal community by means of which the final conclusion (I₁) could be deduced just from the totality of *certain* syllogisms. In this sense, there are no syllogistic internal connections between different syllogisms in the chain of arguments. Here lies the kernel of the whole legal interpretation. The external justification is not syllogistic at all.

On the contrary, the interpretation can always be understood as a *dialogue*.¹⁰ The interpreter *A* presents his standpoint I₁ to another person, to the addressee *B*. At first, *A* and *B* disagree about the standpoint I₁. *B* prefers, say, the interpretation I₂. Hence, *A* is under an "obligation" to argue for his standpoint. On the basis of this disagreement and that "obligation", there begins a procedure that has in jurisprudence usually been called argumentation or (from a slightly different point of view) justification. As was pointed out, this procedure is by nature a dialogue: A presents certain pro-arguments for the standpoint I₁ and - perhaps - B stands for certain

⁹ A. Peczenik., *The Basis of Legal Justification*, p. 41

¹⁰ A. Aarnio, *The Rational as Reasonable*, p. 107.

contra-arguments. Referring to the syllogism figure described above, one can now say that both the pro- and the contra-arguments are syllogisms or that they are based on such inferences.

In the last-mentioned case the argument is a conclusion of a certain syllogism, i.e. a deductive conclusion. On the other hand, one cannot deduce the final result merely from such syllogisms as the premises. Once more: the external justification itself is not a syllogistic inference. It is a question of making the final result (I₁) *acceptable* to the addressee B. In other words, the core of the whole dialogue consists of an effort taken in stages to make B convinced of A's standpoint. If B actually becomes convinced of the result, the justification has, in a sense, been successful. Yet, what should we say of a case where B does *not* actually accept I₁ but instead of it I₂, i.e. where only the interpretation I₂ would be acceptable in this small community of interpretation?

The central problem of the issue is thus related to the concepts of acceptance and acceptability of interpretation. To begin with, the fact that B actually accepts the interpretation I₁ cannot be a sound basis for legal justification. It is, on the contrary, very easy to construct examples in which the actual acceptance has been reached using merely manipulative or persuasive - even compulsory - means. The acceptance involved in these cases is the result of the use of the persuasive authority of the interpreter. In the extreme, this kind of interpretation is nothing else than a way to use power. We do not tend to say in these kinds of situations that the interpretation offered was a proper one. Yet, if this holds true, the problem is open: Why do we not call an interpretation that is actually and widely accepted in a society a *legitimate* one?

We are now faced with the meta-level question of justification. In other words, we deal with the problem of the justification of justification. Based on which kind of reasons can we say that the conclusion of the dialogue - the contextually sufficient justification - is the proper one? This justification of justification can also be called deep justification. In the next part of my paper I will try to give some hints at what I mean by this deep justification.

3. THE NOTION OF RATIONAL ACCEPTABILITY IN LEGAL JUSTIFICATION

Let us imagine a so-called hard-case situation where both of the parties, X and Y, have good grounds to win the litigation. Now we have to make a choice either for X or for Y. What is the primary expectation of the parties X and Y as far as the decision-making is concerned? It seems to be well-founded to argue in favour of the following answer. Both parties have expectations

for a decision that guarantees the *maximum legal certainty* for them.

Legal certainty (rule of law, *Rechtssicherheit*) covers two elements: (a) the demand that arbitrariness be avoided, and (b) the demand that the decision be proper. The former of these criteria refers, for instance, to the predictability of legal decisions. The citizens must be able to plan their future behaviour, and this is possible only on the basis of predictable court practice. In other words, the interpretation presented by the decision-maker cannot be merely random or based only upon irrationality.

The avoidance of arbitrariness is, however, only one side of the coin. As was pointed out, the result of the decision-making must also be right in the material respect. What this means, among other things, is that legal decisions must not only be in accordance with legal norms, but they must also fulfil certain axiological (moral) criteria. Only provided these general conditions are satisfied can the legal decision be acceptable in a society. Furthermore, if a decision is not acceptable in a society, it cannot - in a deeper sense of the word - be legitimate, either.

I invite the reader to think about an example in which a decision is in accordance with all the formally valid legal rules, and in which the decision is also a manifestation of an established court practice. All this may be, at random, a result of the use of societal power in a brutal or manipulative way. The decision does not have its roots in the moral code of the people involved. From another point of view, one can say that the legal rule according to which the decision was made is formally binding and effective but not axiologically valid in that society. It is not legitimate. Legal certainty, defined in the way mentioned above, however, presupposes not only formal validity and effectiveness but also the (axiological) acceptability of the legal decisions.

If this is true, the concept of *legitimacy* has the following content. In order to be legitimate, a decision must satisfy two kinds of criteria:

(a) Firstly, every decision ought to be based on rational discretion. Rationality can be defined in two distinct ways. We can speak about L-rationality and D-rationality.

(i) A decision fulfils the criteria of L-rationality if and only if it follows the logical rules of inference. Deductive inference is an example of L-rationality.

(ii) D-rationality is rationality of another kind. This concept refers to a procedure of discourse that is regulated by the rules of L-rationality and the rules of rational discourse.¹¹

¹¹ See R. Alexy, *Theorie der juristischen Argumentation*, 1983, p. 219.

(b) Secondly, legal certainty presupposes, as mentioned above, that the decision also fulfils some criteria of material rightness, i.e. substantial acceptability in the legal community in question. The same holds true as far as the interpretations of legal dogmatics are concerned. These interpretations must be based on rational discourse (rational procedure of discretion) and the result of that discourse must be legal and reasonable. It must be in accordance with G, D, and V. Provided that these conditions are satisfied, the result is rationally acceptable to its audience. This becomes clear in hard-case situations. Very often there are two or more alternative decisions each supported with reasons that are rationally justifiable. Hence, the problem is to make a justified choice among them. The result of that choice must be reasonable in the sense referred to above.

4. WHY BE RATIONAL ?

What is important is that the concept of rational acceptability is a *reconstruction*, i.e. an ideal model for legal reasoning. Nevertheless, the reconstruction itself is not an arbitrary one. It is not only a stipulative or lexical definition of what the term "rational" means, or what it should mean. The deep justification for D-rationality cannot be based merely on empirical facts either. The idea is not to claim that people are or that they will, at some later stage of their development, be rational in their thinking. People simply are, because they are human beings, irrational in many respects. Yet, the roots of rationality are in our culture, in other words, in the ways we use this concept in ordinary language. The concept of rationality is a given fact in our culture; it is "hidden" in the way we live in Western culture. In this very respect, rationality is bound to the historical stage of development of a certain culture. It is thus quite wrong to think that rationality has certain transcendental grounds or that the notion of rationality itself is a transcendental concept. From this point of view, there are no direct ways to verify the statement that, for instance, the concept D-rationality has the content that it was claimed to have. As G.H. von Wright has noticed, philosophical reconstructions very seldom have such direct confirmations. The most we can do is attempt to show (indirectly) that the reconstruction does not *violate* prevailing linguistic usage. The more the reconstruction fulfils our linguistic expectations the "better" it is. Let us take an example.

All interpretations presented by A either do not apply or are incoherent. What do we think about A? We are inclined to say either that A is crazy, or that he belongs to a culture unknown to us. It is impossible for us to understand that kind of person. A logical and coherent way of thinking is rooted so deeply in our culture that we use it as a measure when evaluating other people's behaviour. In this sense, logic and coherence are necessary elements of our common concept of rationality. They belong to the basis of human communication. Our social life and our human communicative interaction will function only provided these preconditions are satisfied. Referring to these very features, it seems to be correct to say that the reconstruction of rationality only makes explicit something deeply hidden in the common linguistic usage of modern-minded Western people.

Hence, the concept of rational acceptability does not describe the actual course of reasoning in legal dogmatics, or in the adjudication of law. Rational acceptability is an *ideal* only. As such it is, however, important for the everyday practice of both (legal) scholarly work and decision-making. By means of this ideal we have a measure to evaluate the legitimacy of legal interpretation. Furthermore, it gives us the possibility to criticize the results of interpretive work in a legal community.

5. CONCLUDING REMARKS

Let us assume a community C that consists solely of such individuals who bind themselves to the principles of D-rationality, and of which there are more than two members. The additional assumption is that the members of C fulfil criteria by which we can call the community C a legal community. We can call an ideal audience one where the majority of the community accepts the value system V. In our case this ideal audience is thus divided into two separate parts.

Let us further assume two scholars, A and B, who both belong to the community C. Both of them bind themselves to the principles of D-rationality. They are "sensibly reasoning" persons. Scholar A presents a norms standpoint I_1 to the effect that norm N is valid in community C. The other scholar, in his turn, supports the standpoint I_2 that contains the norm M (which is not identical with N). I_1 is according to the value system V and I_2 to the value system U.

If, on legal grounds (G, D) and on the basis on the value system V, the majority of the members of C could accept I_1 , it is rationally acceptable in C. It is acceptable for the majority of those members of the community who accept the principles of D-rationality and, at the same time, who bind

themselves to the value system V. In this regard, we can say that the norm standpoint of scholar A has greater weight in C than does that of scholar B. Each rationally reasoning member of C who binds himself to value system V would come to the same conclusion as A. The views of scholar B, on the other hand, are shared only by the minority of C.

On the basis of these conditions we can derive the following regulative principle:¹²

R: Legal dogmatics ought to attempt to reach such legal interpretations as could secure the support of the majority in a rationally reasoning legal community.

Rational acceptability thus has a *similar role* in legal dogmatics to the notion of truth in, say, the natural sciences.

¹² See in general A. Aarnio, *The Rational as Reasonable*, p. 225.

SEMIOTICS AND THE PROBLEM OF INTERPRETATION

BERNARD S. JACKSON

THE POSITIVIST MODEL OF INTERPRETATION

Contemporary Anglo-Saxon legal philosophy has become obsessed with the problem of interpretation, perhaps in reaction to an earlier stage in positivist jurisprudence when this problem was ignored or at least badly neglected. Contemporary interest in interpretation stems largely from the critique of positivism mounted by Ronald Dworkin, who used the workings of judicial interpretation as an argument against the sufficiency of Hart's form of positivism, based upon a (narrow conception of) the centrality of rules of recognition. In so doing, Dworkin has put the character of legal rationality in issue. But he, in turn, adopts a narrow conception of legal rationality, that which is stated explicitly by judges, or could be stated explicitly by them, in the course of justificatory argument.

In this paper, I take a broader look at the positivist conception of interpretation, in the light of arguments drawn from linguistics. I suggest that the rationalist model of interpretation adopted by Dworkin, notwithstanding its departure from the positivist framework, provides an insufficient account, and that we must look to other sources of inspiration to provide a full account of the nature and role of interpretation in law.

A short, and apparently trite, way of stating the positivist position might be this: interpretation is to be understood as the legal means of applying the law. Within "applying" the law, I include the process of discovery of law, where that is in doubt.

Trite as this proposition may sound, it contains within it three major tenets of positivism: first, that there exists a specifically legal form of interpretation, one which belongs to an autonomous legal universe; second (to put the matter at its weakest) that there exists an intimate connection between decision-making and interpretation, and that normally interpretation of the law is determinative of its application to facts; third, that "the law" ex-

ists as a single unified system, and that only one such system exists within any state.

In what follows, I suggest some semiotic arguments for rejecting each of these three claims of positivism. In the course of so doing, I hope to give some indications of the alternative account which I would suggest. I take the three propositions identified in the last paragraph in reverse order.

THE UNITY OF THE LEGAL SYSTEM

I have argued elsewhere that semiotics adopts a positivist methodology in defining its object of study (the text — which need not necessarily be written), and a realist ontology in accounting for its content (messages, discourse — not norms).¹ The reason for adopting such a viewpoint is that it allows us to describe our object of study, including the metaphysical claims which that object of study makes about its own nature, without endorsing those metaphysical claims. We can observe the communicational process, and see how sense is constructed within it. Only once we have done so are we in a position to assess the social effect of the messages thus communicated.

This is not to say that we should identify every piece of paper which contains the word “law” as a “legal system”. Texts form part of a wider communicational model, the totality of which — in my view — provides us with a realistic test of identity.² We may talk of “semiotic groups” (adopting, or adapting, a term used by Greimas) to refer to a group of people

¹ *Semiotics and Legal Theory*, Routledge and Kegan Paul, 1985, Ch. 6; “Semiotics and Critical Legal Studies”, Working Interventi No. 4, Istituto di Sociologia, Università di Messina, 1986.

² A preliminary conceptual issue requiring clarification is whether the semiotician seeks to claim the existence of (a) a number of distinct semiotic systems within “the law”, or (b) a plurality of “legal systems” within what is normally taken to be a single legal system. We are entitled to employ semiotic criteria in claiming plurality on (a), but does plurality on (b) follow from any such conclusion? If we adopt non-semiotic criteria on question (b), we must admit of the possibility of a single legal system comprising several distinct semiotic systems within it. Clearly, an argument has to be advanced if we are to move from the claim that “our legal system” comprises within it a plurality of semiotic systems, to that which denies the unity of the legal system altogether. To suggest that plurality on (a) should be regarded as entailing plurality on (b) is to privilege semiotic criteria over legal, philosophical or sociological ones. The justification for such a move can only reside at the level of ontology—a claim that meaning and communication have primacy in any account we can give of the real.

who share a particular system of communication, this system being restricted to themselves.³ By a "system of communication" I mean a set of

³ In developing the idea of "semiotic groups", it is necessary to stress the difference between what is here intended and the classical communicational model. For the latter may be thought to involve the idea that the "sender" of a message has in mind the receipt of that message by a particular audience, and that we require "communicational intent" to extend to the identification of that audience, and not merely to the meaning of the message which is communicated. (Such a conception of "semiotic groups" would certainly cohere with a philosophy of law, such as that of Hart, which adopts a very strong communicational model, in defining meaning in terms of the intention of the author not only that a certain sense be attributed to his words by the reader, but also that the reader should understand that the author so intended him to perceive them; see my *Semiotics and Legal Theory*, *supra* n. 1, at Ch. 7). If we were to adopt such a conception, questions may be asked as to whether the model is rightly used to generate a picture of multiple audiences within the contemplation of a single text. It may be asked, for example, for whom the judges think that they are writing, when they pen their judgements. This kind of question was asked of House of Lords judges by Alan Paterson, in the course of his research leading to his book, *The Law Lords*, London, MacMillan, 1983. The result he obtained (at 9-11) was that the judges had no clear idea of the audience or audiences they were addressing. But such a response is susceptible to more than one kind of interpretation. On the one hand, it might be suggested that the judges "intend" no particular audience, so that the whole applicability of the communicational model is here inappropriate. On the other hand, it might be argued that they do intend to communicate, but are vague as to the receivers of their message, and that this very vagueness expresses their perception of the undefined nature of the audience, as covering a multitude of possible groups. However, we can use the notion of a semiotic group to indicate groups within which messages are sent, received and understood, without necessarily implying any authorial intention on the part of the "sender" as to the identity of the particular "receiver". The "audiences" of my communicational model are, in accordance with much continental linguistic theory, to be defined exclusively in terms of those who do receive and use particular messages. We can, therefore, translate my theoretical claim into concrete empirical ones, and investigate the extent of dissemination of the "judgement", and the parts of it which are regarded as pertinent by each of its respective audiences. We use the resources of semiotics in order to construct hypotheses on this matter. We can examine the syntactic, semantic and pragmatic dimensions of discourse in its different legal settings: legislative, doctrinal, and the many different contexts of legal practice, and we can see how far the elements of the judgements (a) appear to be addressed to the same kind of audience, while (b) still remaining within the conventions of the genre of "the judgement". We can then move outside this particular text, and see how it is used. However, this will not generate any straightforward factual verification of a hypothesis. For the semiotic framework here endorsed would claim that the figures of the "sender" and "receiver" are themselves constructed from within discourse, and are not separate and external aspects of its pragmatics. ("Sender" and "receiver" can be, and in this tradition are, narrativized.) That does not mean that no actual senders and receivers exist. What it means is that the real sender and the real receiver each generate their own discourse, in which "senders" and "receivers" are (respectively) constructed. Ultimately, therefore, the construction of a multitude of "receivers" within the judicial discourse is neither verifiable nor falsifiable on sociological grounds.

conventions regarding the media of transmission of messages, and the codes in which they are transmitted. However, to make this definition operational, we have to go further. We have to define the similarity required to constitute a common system of communication. For this, we can adopt a combination of socio-linguistic and semiotic criteria. The socio-linguistic criterion can be partially defined negatively: people cannot belong to a semiotic group when they do not understand the messages communicated within that semiotic group. Thus, although English Law is communicated largely in English, most speakers of the English language are excluded from the semiotic group of the law, since they cannot understand the particular register of the language which the law uses. However, sharing the same socio-linguistic register, though a necessary criterion of belonging to a semiotic group, is not a sufficient criterion. The socio-linguistic criterion applies to the "surface" level of language, particularly its lexicon and syntax. There is also a semiotic criterion, which takes us to the "deep structure" of signification of a particular form of discourse. This deep level contains "closure rules" peculiar to particular forms of discourse. It is on the basis of this criterion that I would suggest that the use of "legal English" is not itself a sufficient criterion of a semiotic group, and that there exist several distinct semiotic groups within the users of legal English. These closure rules which constrain the construction of sense in particular forms of legal discourse may be regarded as part of the "code" which defines the identity of particular communicational systems.⁴

In a previous publication, I have used this argument to explain the difference between Hart and Dworkin on the issue of "logical spaces" in the legal system.⁵ For present purposes, it is necessary only to summarize the argument. In adopting a positivist framework, namely that law exists only when legal institutions have said so, Hart must inevitably argue that when legal institutions have not endorsed the existence of a rule, that rule does not exist in law. The closure rules implicit in this argument are a form of propositional logic: the propositions: "the legal institutions have endorsed rule x" and "the legal institutions have not endorsed rule x" are

⁴ I use "code" loosely, without implying that kind of univocality of encoding and decoding which is opposed to the notion of "interpretation" by Dan Sperber and Deirdre Wilson, *Relevance — Communication and Cognition*, Oxford: Blackwell, 1986.

⁵ "Hart and Dworkin on Discretion: Some Semiotic Perspectives" in D. Carzo and B.S. Jackson, *Semiotics, Law and Social Science*, Rome and Liverpool: Gangemi and the Liverpool Law Review, 1985, pp. 127-147.

contradictories: they are mutually exclusive, in the sense that the denial of either one entails the affirmation of the other. With the affirmation of either one, there must follow the consequences which attach to it. If it is not the case that the legal institutions have endorsed rule *x*, then rule *x* cannot be part of the law. We can represent this argument in the form of a logical square, the contraries of which are (A) the affirmation that the legal institutions have endorsed rule *x* and (E) the internal negation of that affirmation (viz., that the legal institutions have endorsed the negation of rule *x*). The contradictories are the respective external negations of the two contraries: the denial that the legal institutions have endorsed rule *x* (O, the contradictory of A) and the denial that the legal institutions have endorsed the negation of rule *x* (I, the contradictory of E). According to the elaboration of the logical square by modern logicians such as Blanché and Kalinowski, we arrive at a fifth point (Y), which is that the legal institutions have endorsed neither rule *x* nor the negation of rule *x*. This fifth point stands in a triadic relationship to the two contraries, in the sense that the affirmation of any one point in the triad entails the denial of the other two (although the denial of any one does not indicate which of the other two should be affirmed — an extension of the logic of contraries).

Dworkin differs from Hart both in propositional content and semiotic structure. Instead of some act of institutional recognition, he adopts, in effect, the (constructive) knowledge of the judge of the rights of the parties. But this, in itself, could lead to exactly the same result as Hart's scheme, with a "logical space" at the bottom of the triad of contraries, expressed by the proposition that the judge knows neither that party *x* has a right to win nor that he lacks a right to win. Dworkin excludes this possibility on very obvious grounds: the judge cannot say he does not know, and abandon the litigation as non-*liquet*. He has to give a decision, and this decision must be based upon his knowledge of the rights of the parties. The adoption of this closure rule results in a quite different semiotic structure from that underlying Hart's model. The contradictory positions (points O and I in the square) of the two contraries (points A and E) are excluded in practice; they function only as the bases of presuppositions leading to adoption of the opposite contrary. If the judge does not know that *x* has a right to succeed (O), he must act as if he does know that *x* has no right to succeed (E); if the judge does not know that *x* has no right to succeed (I), he must act as if he knows that *x* has a right to succeed (A). In other words, the two contraries are treated in practice as if they were contradictories: not only does the affirmation of one entail the denial of the other; the denial of one entails the affirmation of the other. We have here an example of the semiotic square of Greimas, rather than the square of classical logic, and its modern extensions.

It is important to stress that this difference in closure rules, or semiotic structures, is not entailed by Dworkin's having adopted the "rights thesis" as opposed to some test of institutional recognition. It stems rather from the particular context of legal discourse in which Dworkin assumes the rights thesis to be used — namely, litigation. For it is in litigation, and only in litigation, that the external negations of the contraries are excluded. Litigation therefore represents a form of legal discourse with a particular code of its own, and this justifies our identifying the users of it as an independent semiotic group.

Hart can hardly deny the closure rule present in litigation, which is at the basis of Dworkin's analysis. It follows that Hart must be thinking of a different type of legal discourse, and with it of a different semiotic group. It is more difficult to identify the context which Hart has in mind than it is for Dworkin. I have, however, suggested that it is primarily "legislative discourse", debate amongst legislators and civil servants as to the preparation of legislation, in which they contemplate prospectively what gaps may exist.

On this criterion, we have two quite distinct forms of legal discourse. We could use similar arguments for a host of other types of legal discourse: doctrine, solicitor-client relations, discourse between practitioners, media communication of law to the general public, communication of legal messages in advisory agencies, etc. All these are defined by the existence of both distinct sets of users of the particular form of legal discourse and distinct conventions of knowledge applicable within them (whether these latter must always amount to different semiotic structures is a question I need not here pursue).

In fact, I would now seek to go further than I did in my earlier analysis of the Hart/Dworkin debate. My original conclusion was that while both authors claimed to describe (a particular kind of) judicial discourse, in fact the Hartian model was more properly applicable to legislative discourse, while the Dworkinian best fitted doctrinal discourse. The Hartian model fitted legislative discourse in the sense that it reflected the intentions of the draftsmen of legislation, and the determinacy and finitude of their intentions. The Dworkinian account fitted doctrinal as opposed to judicial discourse, in the sense that it insisted upon a restriction to legal principle as opposed to legal policy (despite considerable evidence that the judges do indulge also in the latter), and utterly neglected to take account of the strictly adjudicatory aspects of judicial discourse, namely its necessary inclusion (whether explicit or implicit) of consideration of the possible impact of any decision in the particular circumstances of that case, for the particular parties before the Court.

The merit of that analysis (if I may presume such distance and authority) was that it resolved an apparent conflict between two leading modern philosophers in an aesthetically pleasing way. However, it was still overly reductive, insofar as it might appear to suggest a single, very simple semiotic structure as underlying legislative discourse on the one hand, doctrinal on the other. I would not wish to be committed to any such simplified view. And in fact, all I have claimed is that the Hartian and Dworkinian models, respectively, properly belong to the analysis of these other two forms of legal discourse, and not that either one provides a sufficient account of the semiotic structure of that kind of legal discourse. Let me now sketch the content of the gap which I have myself created. If neither the Hartian nor the Dworkinian account is properly referable to judicial discourse, what is the semiotic structure of the latter? What semiotic account may be given of interpretative practice by judges?

A full answer to this question would have to take account of the different function of judges at different levels of the legal system. I restrict my remarks here to the appellate level, where the current debate in legal philosophy has focused. But first, a necessary qualification. When I say that the Hartian and Dworkinian models are properly referable to legislative and doctrinal discourse respectively, I am not committed to the proposition that they are exclusively so referable. What I am claiming is that the legislative and doctrinal contexts are the most appropriate contexts, if we assume that Hart and Dworkin are seeking to provide a sufficient account of the characteristics of some particular form of discourse. That is not to say that these models — elicited by reference to analysis of this debate — are not also manifested in judicial discourse, even though neither one approaches anything like a sufficient account of judicial discourse.

In fact, "discourse" — that is, actual texts used in communicational situations — manifests multiple structures, in accordance with the pragmatics of the particular situation. Tentatively, I suggest that judicial discourse is the most complex of the three I have distinguished, in terms of such pragmatic considerations. Specifically, the appellate judge in Common Law courts is "addressing"⁶ simultaneously (or at least in the course of a single judgement) at least three different audiences: the parties to the dispute (including, for present purposes, their legal representatives), the legal profession, and also addressing the wider social and political (perhaps particularly political) world. He must take account of the interests, values and issues relevant to each of those audiences. In other words, he is engaged

⁶ In the sense indicated *supra*, n. 3.

simultaneously in at least three different kinds of discourse. Each one of these may be differently structured, in terms of the existence and non-existence of gaps, and the nature of the closure rules appropriate to that form of discourse.⁷ And in this very limited sense, both Hart and Dworkin are right insofar as they claim to be talking about judicial discourse, since the discourse of which they talk does include messages directed to the bureaucracy and messages directed to the world of doctrine, notwithstanding any assumption we may make that judicial discourse is primarily addressed to the tasks and parties of adjudication.

To argue that each of these different types of discourse represents a distinct “legal system”⁸ — especially if we claim a plurality of such systems even within a single text — might seem counter-intuitive. Arguments might be mounted against it on a variety of grounds,⁹ including both ordinary language and logic. In all these discourses we talk about “the law”, and we assume by that that we are talking about one and the same phenomenon. And the logician might argue that we must distinguish between the norms themselves (related by what Kalinowski has called the “logic of norms”) and discourses about them, whether these latter be legislative, doctrinal or adjudicatory. In fact, these two objections are different ways of expressing the same idea: “the law” is something distinct from its texts; it is something to which those texts refer. In ordinary language, that to which they refer is simply “the law”; in logic, that to which they refer are norms — pure deontic phenomena, rather than propositions about them.

I reject both versions of the objections, not simply on the basis that they both — in their different ways — assume a metaphysical reification (of “the

⁷ Adoption of this viewpoint opens up an immense area of work. It will not be sufficient merely to lift, and formalize, the different types of semiotic structure which may co-exist in a single discourse (each one referable to a particular pragmatic concern). To do this is important, to be sure. But modern semiotics leads one to expect that the whole is greater than the sum total of its parts, and that any analysis will be insufficient, insofar as it fails to take account of the inter-relationships of those semiotic structures within the individual discourse. In other words, we must study the interaction between these different semiotic structures, and not view them as isolated units, merely co-existing within a single text. Greimasian semiotics has developed the idea of inter-reacting semiotic squares. The next step must be to consider the inter-relationship between semiotic squares and different types of semiotic structure, such as the discursive use of the logical model (e.g. the hexagon) itself. See further *infra*, n. 11.

⁸ As I have in *Semiotics and Legal Theory*, *supra* n. 1, at Ch. 11.

⁹ See further *supra*, nn. 2-3.

law" or "the norms") for which I see no warrant, but also on the basis of linguistic theory. The tradition of semiotics to which I adhere, namely the Saussurian tradition, rejects "reference" as a constituent part of the construction of meaning.¹⁰ "The law" or "the norms" are not objects external to particular forms of discourse, to which those discourses refer; they are constructed within those forms of discourse, and form part of the system of signification which makes such discourse meaningful.¹¹ Of course, the content of the message includes the claim that "the law" or "the norms" do have some form of metaphysical existence external to particular forms of legal discourse. But that is simply part of the message of the discourse, which we have to study; it is not a condition of accounting for the meaning of the discourse itself. Elsewhere, I have argued that the acceptance or denial

¹⁰ See further *Semiotics and Legal Theory*, *supra* n. 1, at pp. 14-17.

¹¹ Here, we have to take a view on the nature and identity of the minimal units of legal signification. Are they abstract entities which exist outside discourse, and to which discourse refers? Or are they units of the discourse itself? Broadly, the former (extensional, referential) view characterizes the philosophy of ordinary language, and is assumed by both Hart and Dworkin (notwithstanding the systemic character of legal argumentation proposed by the latter). By contrast, structuralist conceptions of semiotics (such as that of the Greimasian school) adopts an intensional, non-referential view, which would deny actual reference to outside phenomena, and accept only discursive claims to refer to other forms of discourse (inter-discursivity). Thus, it is possible for Hart to identify the minimal units of the legal system as consisting of "rules" (just as Kelsen sees them as consisting in "norms"), while Dworkin adopts a different identification of these minimal units within the same theoretical framework — by seeing them as "rights", to which — once again — judicial discourse refers. If we adopt this kind of model, it is open to us to propose different semiotic structures for judicial discourse on the one hand, and its referents (the minimal units outside the discourse) on the other. This is the path adopted by some logicians, such as Georges Kalinowski, in distinguishing between the "logic of norms" and discourse about norms. Indeed, Kalinowski adopts a semiotically-sensitive elaboration of this approach, which recognizes distinct forms of legal discourse, which he describes in terms of different legal languages: *Introduction à la logique juridique*, Paris: P.U.F., 1965, etc. (for a partial bibliography of the very important work of Kalinowski, see my *Semiotics and Legal Theory*, *supra* n. 1, at p. 361 f.) It would be open to someone adopting a theory so structured to take the view that gaps may exist at the purely logical level, that of the independent minimal units (norms, rules, rights), while at the same time accepting that any discourse about those minimal units must include closure rules (perhaps different closure rules for each kind of discourse) which would foreclose the existence of gaps. However, structuralist semiotics finds it difficult to accept the existence of such minimal units outside discourse. It accepts — paradoxically, for reasons of empiricist methodology — only the existence of discursive phenomena, and these are structured with closure rules, even though their message is to proclaim the existence of a phenomenon lacking such closure rules.

of a referential theory of language is central to an appreciation of the differences within legal semiotics,¹² and to the relationship between semiotics and critical legal studies.¹³ It follows from the present argument that this issue is also central to the philosophy of law.

DECISION-MAKING AND INTERPRETATION

The second tenet of the positivist conception of interpretation concerns the relationship between interpretation and decision-making. Those who endorse the normative syllogism take the view that interpretation is determinative of decision-making. For according to this model, decision-making consists in the deductive application of rules of law to facts which are found as instantiating the conditioning facts of the rule which forms the major premise of the syllogism, and interpretation is the means (in hard cases) of determining what the major premise of that syllogism is. Legal realists, of course, have long attacked this view. But their attack is contingent, rather than conceptual. Experience shows, they argue, that decision-making frequently diverges from the model of the normative syllogism; judges actually decide cases on grounds different from the interpretations of the law which they give by way of justificatory argument. This is a contingent criticism, depending upon the workings of particular legal systems. There is nothing in the realist argument to suggest that there is something in the nature of adjudication which makes this divergence between interpretation and decision-making inevitable.¹⁴

Semiotics, on the other hand, provides grounds for concluding that the distinction between interpretation and decision-making is conceptual, and not merely contingent. In so doing, it endorses Kelsen's increasing appreciation of the distinction between cognition and will.¹⁵ Interpretation, at least as it is conceived in the positivist tradition, depends exclusively upon the

¹² "Emerging Issues in Legal Semiotics", *Revue de la Recherche Juridique. Droit Prospectif* (1986-2), pp. 17-37.

¹³ "Semiotics and Critical Legal Studies", *supra* n. 1.

¹⁴ For a parallel argument, see W. Twining, "Some Scepticism About Some Scepticisms", *Journal of Law and Society* 11/2 (1984), pp. 137-171; 11/3 (1984), pp. 285-316.

¹⁵ See my *Semiotics and Legal Theory*, chapter 10; and "Kelsen Between Formalism and Realism", *Liverpool Law Review* VII(1) (1985), pp. 79-93.

relationship between propositions (their semantic and syntactic relations); decision-making contains a necessary pragmatic element: what to do with people.

To illustrate this, take Hart's famous example of the rule: "No Vehicles in the Park" and assume that the by-law which establishes this rule also provides for a £25 fine where the rule is violated. Let us call this by-law "R". We can ask a series of different questions about it. The first is simply this: "What is the meaning of R?" Suppose I am strolling in the park with a foreign visitor, who has an imperfect command of English, and does not know the meaning of the word "vehicle". He points to the notice, and asks me what it means. In so doing, he is asking me for a paraphrase of the rule, the equivalent — at the level of the sentence — of the lexical (dictionary) definition of a single word. If we further adopt, for the purposes of this argument, Hart's own distinction between the "core of settled meaning" of a term, and its "penumbra of uncertainty", we might say that the question about R asked by our foreign visitor is one which seeks to elicit the core meaning of R. So we are likely to tell him, with little hesitation, that the notice means that we cannot drive a car or a lorry through the park. I call this a question of "meaning".¹⁶

Let us now change the question and the context. I am conducting a class in legal philosophy, in which I am seeking to introduce the students to Hart's distinction between the core and the penumbra. I ask the students whether they think that bringing a toy car into the park is "covered by" R. The form of the question has now altered. I am no longer asking for a paraphrase of R. Such an answer would clearly be insufficient for the purpose. What I am doing is to ask whether a particular case (let us call it x) is or is not an instance of R. Different legal systems and different legal theories answer this question in a variety of ways. Continental "teleological" interpretation (wider than the British notion of legislative intent) suggests that the words of R come laden with a purpose (as Fuller would agree), and that this purpose may well resolve what otherwise would be irresolvable in purely linguistic terms. If the purpose of R, for example, is taken to be the preservation of the peacefulness of the park, then x may be considered covered by R, at least if we are considering a noisy toy car. On the other hand, if the purpose of R is taken to be the maximization of the enjoyment of the users, the conclusion might be drawn that the enjoyment of children

¹⁶ To say this is not to adopt a view of "literal meaning" as context-free. See J.R. Searle, "Literal Meaning", *Erkenntnis* 13/1 (1978), pp. 207-224, reprinted in his *Expression and Meaning*, Cambridge: Cambridge University Press, 1979, ch. 5.

taking toy cars into the park outweighs the reduction of enjoyment of other users, so that x is not covered by R . The whole argument can be debated linguistically, by the use of rational argument, and this can be done in the classroom just as well as in the court. I call this the question of "interpretation".

The question which the judge has to ask himself assumes a different, and very particular, form. It is not whether x is covered by R , but rather what he, the judge, should do with the defendant, in the light of his perception of the question of interpretation. In our legal system (unlike that of classical Rome, for example) the same person, the judge, must both interpret and adjudicate. Just as jury studies have suggested that decisions of fact cannot in practice be isolated from the jury's view of the acceptability to them of the legal consequence of those facts,¹⁷ so too we cannot conceive of the judge's view on the question of interpretation being unaffected by his feeling as to the acceptability of the consequences of applying any particular interpretation to the case in hand. Adjudication thus creates a very particular context for interpretation, one which necessarily distinguishes it from interpretation in the classroom. It is a weakness in the legal theory of Ronald Dworkin that he fails to take account of the difference: he equates interpretation with adjudication, thereby substituting the semantics of the classroom for the pragmatics of the court.¹⁸

Adjudication thus combines the functions of decision-making and interpretation. How, if at all, are they related? At least three kinds of answer are possible. The formalist, who endorses the normative syllogism, will say that interpretation both is and ought to be determinative of decision-making. At the other extreme, the sceptic may argue that interpretation neither is nor ought to be determinative of decision-making. The judge is doing two quite separate things, making his decision and justifying it; our acceptance of the justification, the sceptic may argue, merely reflects the ideological legitimization which we accord to the pronouncements of the judge. A third view would seek to mediate between these two extremes: interpretation has an influence upon decision-making, but is not determinative of it.

Before we can judge the relative plausibility of these three alternatives, we have to attempt to give some further specifications to the last. What kind of

¹⁷ A point already made by Jerome Frank, *Courts on Trial*, Princeton: Princeton University Press, 1949.

¹⁸ Cf. my earlier remarks in *Semiotics and Legal Theory*, *supra* n. 1, at Ch. 9, esp. pp. 221-224.

constraint might interpretation exercise over decision-making, if it is not, after all, determinative of it? Legal theory has been unable to answer this question at the descriptive level (although theories have been proposed as to how far interpretation ought to influence decision-making), and there are good reasons why it has failed to do so. On the one hand, the question of interpretation rarely admits of so demonstrable an answer that we can say how far the judge's decision has been influenced by it or not; secondly, contemporary social science is hardly in a position to describe the processes of decision-making by judges in individual cases, notwithstanding the extent to which sociologists may succeed in identifying, and even quantifying, the relative importance of non-legal factors in the adjudicatory process in general.

Semiotics and social psychology may take us somewhat further in answering such questions.¹⁹ Semiotics provides the resources to describe what kind of discourse the common law judgement is; in combination with social psychology, it may help us to understand the subconscious rationality of the judge, both in decision-making and interpretation.

The common law judgement has a complex semiotic character. We start with it as a semiotic object, a text. But within it, it includes a plurality of discourses. Through it, the judge is addressing a variety of different audiences: the parties, the legislator, legal scholarship (the world of doctrine), fellow judges, etc. To the extent that each one of these represents a distinct semiotic group, on the criteria described above, we may say that the text includes a number of distinct discourses. That containing the decision is the discourse between judge and parties; that containing interpretation is directed primarily to the doctrinal audience.

Do these separate discourses merely co-exist side by side in the same text? In principle, the answer should be negative. We do not have to be fundamentalist holists to suggest that the judgement is also a discourse in itself, with its own internal relations. It is, after all, a highly conventional piece of literature, with set forms and a well-established cultural tradition. We may therefore expect the discourse of the judgement to mediate between (set constraints to, impose closure rules upon) the relations between the different discourses which it contains. The judgement is thus both a discourse and a meta-discourse, and to understand the latter we need a theory of meta-discourse.

¹⁹ For a discussion of the contribution of these traditions in the context of fact construction, see my "The Narrative Model of the Trial: Semiotics and Social Psychology", *European Yearbook for the Sociology of Law*, forthcoming.

Such a theory is not yet available off the peg, and this paper is not the place to tailor it. I shall, however, suggest that such a theory must account for the relations between two forms of rationality, conscious and unconscious, in both decision-making and interpretation. I shall sketch some of the elements needed to do this.

ON THE AUTONOMY OF LEGAL REASONING

It is the presence of unconscious as well as conscious elements in both decision-making and interpretation which undermines the positivist view of the autonomy of legal reasoning. Such a claim is hardly new. Llewellyn assigned a role to the trained intuition of the lawyer, which he called the "lawyer's natural law".²⁰ In proposing this view, he went beyond earlier realist conceptions of the "judicial hunch" (such as that of Frank), which saw the judge as applying a personal intuition, informed if at all by popular as opposed to judicial attitudes. There is reason to claim that both approaches are right, and complementary. The judge can hardly isolate himself either from the sentiments of the professional community whose values he has internalized, nor from the more general community of which he is a part. But even Llewellyn seems to have viewed the judicial subconscious as operating only at the level of decision-making, and not as affecting doctrine. In this latter respect, we might adapt the much-maligned view of Savigny, that the jurists represent the legal consciousness of the people, in suggesting that the judge's social (popular) subconscious may inform not only decision-making but also the choice of justificatory argument.

The particular form in which subconscious rationality informs both decision-making and interpretation appears to be narrative. I derive this view from a variety of different sources: the social psychology of Bennett and Feldman, the semiotic narratology of Greimas, and the structure of legal history (in which "collective images" fill out "patterns of criminality", adopted by George Fletcher in his account of English Criminal Law). I have elaborated these arguments elsewhere,²¹ and need only summarize them here.

²⁰ *Jurisprudence, Realism in Theory and Practice*, Chicago and London: University of Chicago Press, 1962, pp. 111-115. For an overview of forms of legal rationality, see my "On the Tyranny of the Law", *Israel Law Review* 18/3-4 (1983), pp. 327-347.

²¹ "Narrative Models in Legal Semiotics", in C. Nash, ed., *Narrative in Culture*, London: Routledge & Kegan Paul, forthcoming; "The Narrative Model of the Trial...", *supra* n. 19. On the work of G. Fletcher, *Rethinking Criminal Law*, Boston & Toronto: Little, Brown & Co., 1978, see my review article in *Criminal Law Review* (1979), pp. 621-629, and my "Towards

Bennett and Feldman suggest that juries make judgements on questions of fact by assessing the credibility of the story in relation to a stock of social knowledge consisting of model narratives reflecting common experience and culture. Finding facts thus consists in comparing proposed stories with this stock of narrative social knowledge. It follows that, notwithstanding the special exclusionary rules of the law of evidence, fact finding depends upon social, and not merely legal, conventions of knowledge. Moreover, the cognitive base of rules also appears to take a narrative form. The real process of "applying" rules to facts may therefore be a matter of comparison of narratives, rather than the formalist conception of the normative syllogism.

What of legal reasoning in 'hard cases'?²² In asking this question, I make two assumptions: first, that the appearance of a "case" as "hard" is itself a semiotic phenomenon, the construction of a certain kind of sense, independent of the question of how that question may be resolved. Secondly, I assume that the distinction between "interpretation" and "adjudication" remains important in this context, notwithstanding the fact that the same "question of interpretation" may appear as part of an adjudicatory decision. I maintain that processes of subconscious rationality are involved in the construction of "hard" cases, whether by way of interpretation or adjudication. Here, my examples are both taken from the sphere of interpretation; where the same questions are asked in court, for the purposes of adjudication, this account will not prove sufficient.

My thesis regarding the character of subconscious rationality — or at least of one major component within it — is quite simple. There exist networks of binary oppositions which are associated with each other.²³ Thus, A may be opposed to B, Y to Z. The two oppositional pairs are associated in the sense that when A is present, we expect Y (rather than Z) to

"Towards a Structuralist Theory of Law", *The Liverpool Law Review* 2 (1980), pp. 23-25 (Jurisprudence Issue).

22 For earlier treatments see P. Robertshaw, "Unreasonableness and Judicial Control of Administrative Discretion: The Geology of the Chertsey Caravans Case", *Public Law* (1975), pp. 113-136, discussed in my "Towards a Structuralist Theory of Law", *supra* n.16, at pp. 25-27; P. Robertshaw, "Semantic and Linguistic Aspects of Sex Discrimination Decisions. Dichotomised Woman", in Carzo and Jackson, *supra* n.3, at pp. 203-227; B.S. Jackson, "Conscious and Unconscious Rationality in Law and Legal Theory", paper delivered at the Conference on Reason and Law, Bologna, 1984, to be published shortly in the conference proceedings.

23 For present purposes, it is not important to decide to what extent, if at all, such oppositions occur "naturally" rather than as a result of social contingency.

be associated with it; when B is present, we anticipate Z. When such associations are realized, the situation which manifests them strikes us as intuitively clear. But when these associations are reversed, we have a mixture of categories which produces confusion or difficulty.²⁴

My first example is taken from ancient law.²⁵ Various legal systems exhibit a duality of remedies relating to damage and injury caused by animals. Roman law knows the *actio de pauperie* and the *actio de pastu*; English law early developed the distinction between the scienter action and cattle-trespass; Biblical Law has a section on the "goring ox" (Exodus 21:28-32, 35-36), and a quite separate section, using distinct terminology, for depasturation (Exodus 22:4). Underlying this common distinction, there are a number of correlated associations: between naturally wild and naturally tame animals, between hostile behaviour and friendly behaviour, between acts found in nature and those related specifically to human culture. Thus, the depasturation remedies involve naturally tame animals, performing non-hostile acts (eating, walking) in a context related to human culture (agriculture). The other set of remedies relate to naturally wild animals, performing hostile acts, in contexts not associated with human culture. Such is the case of the Biblical goring ox and the Roman fighting rams, behaviour described respectively by the Rabbis as *lo kederkah* and by Ulpian as *contra naturam*.

So far, so good. But sometimes the categories get mixed. What if the tame animal commits an aggressive act in a cultural context,²⁶ or the animal eats something quite unnatural for its consumption (e.g. clothes or utensils²⁷) or the draught mule employed in the transport industry causes havoc by an excusable but violent act which occasions a pile-up on the Capitoline Hill?²⁸ These are all difficult cases, which call for judicial or

²⁴ The importance of underlying boundaries between categories has been stressed in the work of Mary Douglas, *Purity and Danger*, London: Routledge & Kegan Paul, 1966, and the Greimasian school is particularly interested in the superimposition of binary oppositions on one another, in order to examine the compatibilities and incompatibilities which result: e.g. A.J. Greimas, "Pour une Théorie des Modalités", *Languages* 43 (1976), pp. 90-107.

²⁵ See further "A Semiotic Approach to Biblical Law" in *The Oxford Conference Volume*, ed. A. Fuss, Atlanta: Scholars Press, 1987 (Jewish Law Association Studies, III), pp. 5-29.

²⁶ *Wormald v. Mold* (1954) 1 Q.B. 614, since reversed by s.4 of the Animals Act, 1971.

²⁷ *Mishnah Baba Kamma*.

²⁸ *Digest* 9:2.52.2.

juristic discussion. There is no readily-available intuitive answer; the boundaries have been confused.

That is why the cases present the appearance of being "hard": it is not simply the result of some semantic ambiguity in the doctrinal formulation of the rule. The doctrinal formulation represents an attempt to resolve the problem. And it too may have its level of subconscious rationality — whether of the popular or the 'professional' kind. The Roman jurists adopted a formulation — *contra naturam*²⁹ — inspired by the teleological conception of nature prevalent in their day: the natural was what entities normally are and ought to be in order to achieve their full potential. As an abstract formulation, that represents conscious rationality. But the judgement as to what actually comprises the (teleological) nature of any entity implicates those social values which inform (in different ways) both the popular and the professional subconscious. And these social values call for independent semiotic analyses: In what forms are they perceived, retained and communicated as meaningful (indeed, as natural)? How is the stock of social knowledge organized? — Where should we look for our models? — To Kant or to Lévi-Strauss?

Dworkin himself provides a hypothetical case, which falls into the same kind of category. In "No Right Answer",³⁰ he discusses the following example:

Suppose the legislature has passed a statute stipulating that 'sacrilegious contracts shall henceforth be invalid'. The community is divided as to whether a contract signed on Sunday is, for that reason alone, sacrilegious. It is known that very few of the legislators had that question in mind when they voted, and that they are now equally divided on the question of whether it should be so interpreted. Tom and Tim have signed a contract on Sunday, and Tom now sues Tim to enforce the terms of the contract, whose validity Tim contests. Shall we say that there is a right answer to the question of whether Tom's contract is valid, even though the community is deeply divided about what the right answer is? Or is it more realistic to say that there simply is no right answer to that question?³¹

²⁹ *Digest* 9.1.1.7.

³⁰ In *Morality and Society. Essays in Honour of H.L.A. Hart*, ed. P.M.S. Hacker and J. Raz, Oxford, The Clarendon Press, 1977, pp. 58-84.

³¹ *Ibid.*, at p. 58.

Why does this appear as a “hard case”? It no longer seems sufficient to say, as Hart once did, that the case is difficult simply because we have the application of a general term (“sacrilegious”) in a situation which falls within its “penumbra” rather than its “core”, and indeed Hart himself has more recently accepted — though only for the purposes of adjudication — that interpretation involves more than the resolution of linguistic problems.³² Rather, we should ask what oppositional categories are implicated in this situation, and whether we can identify apparent mixtures, or boundary confusion between them? The opposition “sacred v. profane” is one of the most commonly encountered binary oppositions, perhaps even a universal of human culture. The sacred and the profane both have their associations in particular cultures. The sacred is associated, on the one hand, with a calendar of particular days, on the other hand with particular purposes. Thus, to go to Church on a Sunday is a clear case of the sacred. Where the opposed categories are also associated, the case is equally clear: going to work on a Monday is a clear case of the “profane” (or “secular”?).

What happens when the associations are confused? It might seem that this might generate both “clear” and “difficult” cases. Clear cases would be those in which there is an obvious clash of categories, for example, working on a Sunday, whereas difficult cases would be those where the clash of categories is not so obvious, as in Dworkin's example. What differentiates these two cases? Three kinds of answer seem to be available. First, the kind of answer originally favoured by Hart — that it depends whether the case falls within the “core” or “penumbra” of the meaning of the general word (“sacrilegious”) used in the rule. The second is that of Dworkin, namely that there is a conflict of underlying principles, which has to be resolved at a level comparable to that of literary “fit”. And the third is the model of subconscious rationality which I am here seeking to develop.

Let me insist again on the importance of the difference between two questions: first, what is it that makes a “case” appear as “hard” or “easy”?; second, what strategies should we adopt in order to resolve hard (and, for that matter, easy) cases? Traditional legal philosophy sees these two questions as conceptually related. A case appears easy if the answer to it appears unproblematic (“demonstrable” according to some versions of positivism); it is “hard” if either there is no apparent answer to it, or that answer is conceded as problematic, in the sense of admitting of rational dissent. But that conceptual linkage in traditional legal philosophy derives from the privileging of conscious rationality: a case appears as “hard” or “easy”

³² *Essays in Jurisprudence and Philosophy*, Oxford, The Clarendon Press, 1983, p. 7 f.

according to the kind of rational answer which may be given to it. This is the reason why the "question of meaning" and the "question of interpretation" have so often been conflated. The methodology of "core" and "penumbra" is really a strategy of persuasion, a rhetoric, relevant to the resolution of cases, and it thus provides an answer to questions of the second type. Similarly, Dworkin's particular form of justificatory argument is a rhetoric of persuasion in relation to the solution to problems; it does not in fact tell us why those problems are generated in the first place.

The model of subconscious rationality does enable us to separate these two quite distinct semiotic questions: what makes a problem appear "hard" or "difficult", and what makes the solution to a problem appear more or less plausible. Let us now return to the problem of sacrilege, and try to determine why working on a Sunday might appear a clear case of conflict between categories, whereas signing a contract on a Sunday (Dworkin's example) presents itself as a "hard case". The answer, I think, derives not from linguistics, but rather from the structure of social knowledge which linguistics (albeit imperfectly) reflects. The association between elements in different binary oppositions are not constructed arbitrarily by the analyst; they are formalizations of social knowledge which is itself constructed primarily in narrative forms. Thus, the narratives of "going to Church" and "going to work" have in-built temporal associations in our culture: most Church-goers perform this activity on a Sunday, most workers perform that activity on "weekdays". On the other hand, the narrative of "signing a contract" has no such strong temporal association, perhaps because contracts may belong to the "home" (spatial) sphere as opposed to "work". The case is difficult, it seems, for a combination of reasons: (a) because of the lack of a temporal association with the activity of "signing a contract" in our narrative models, we have no ready-made model of "signing a contract on a Sunday"; and (b) because of this, we have no associated social qualification or evaluation of that activity — as good, bad, "religious" or "profane".

We need to pursue further the question of the relationship between the semiotic construction of "hard cases", and the manner of their resolution. It flows from the distinction on which I have insisted above, between "interpretation" and "adjudication", that the resolution of difficult cases will differ in those two contexts. As for "interpretation", we may adapt Dworkin's model to the subconscious level, by suggesting that an answer to a difficult case is plausible to the extent that we thereby construct a new narrative model which fits with existing narrative models in our culture. But the kind of "fit" to which I am referring is not the "fit" of rational argument, on the model of literary criticism. We need: a model of that subconscious rationality which structures our intuitive feelings for a right answer; a model

of the (conscious) rational “fit” which makes our justification of the decision plausible; and a model of the relationship between the two.

Consideration of such examples suggests the following conclusions. Legal rules are linguistic expressions of narrative models, the latter loaded with tacit social evaluations. The translation of these narrative models into conceptual language may conceal their origins, but interpretation based upon the language of the propositions is likely to prove unstable to the extent that it runs counter to the social evaluations of the narrative models underlying the text. In short, subconscious rationality, reflecting social knowledge and values, may actually threaten to subvert legal doctrine.³³

CONCLUSION

“Interpretation” provides the central focus of only one form of legal discourse, and the traditional model of conscious rationality fails to provide a complete account even of that. Nevertheless, interpretation plays a vital ideological function, in concealing some of the cracks in the theory of the Rule of Law, and this accounts for its centrality in modern legal philosophy. If the justification of this ideology collapses, then we must either amend our adjudicatory practices (perhaps by substituting computers for human judges?), or find a new ideological justification. In fact, we have good reason to prefer human judges — with all their imperfections — to computers.³⁴ This is not the place to construct a more realistic justification for human adjudication. It must suffice to say that this justification must take account of subconscious rationality as well as the rationality of imposed law, supported by the ideology of representative democracy.

³³ See further my analysis of the criminal law problem of attempting the impossible, in “Narrative Models in Legal Semiotics”, *supra* n. 21. This is not the only way in which an unconscious rationality influences legal doctrine. Recent studies by D. Kennedy on Blackstone (“The Structure of Blackstone’s Commentaries”, *Buffalo Law Review* 28/2 (1979), pp. 205-382) and A.-J. Araud on the French Civil Code (*Essai d’analyse structurale du Code Civil Français*, Paris: L.G.D.J., 1973; see also his *Critique de la raison juridique. I. Où va la Sociologie du Droit?*, Paris: L.G.D.J., 1981, Pt. II) show in their different ways how literary structures may reflect values which the authors of the documents have chosen not to make explicit.

³⁴ See my “On the Tyranny of the Law”, *supra* n. 20.

PRELIMINARY REMARKS ON A LEGAL LOGIC AND ONTOLOGY OF RELATIONS

Foundations of a Legal Theory based on the Concept of a Person

ARTHUR KAUFMANN

By using the words "preliminary remarks" in the title my intention was to express a certain reservation. The reason is that the more one engages in the subject of the logic and ontology of relations, the more conscious and reserved one becomes in one's statements. My starting premise is that the third Reich has bequeathed to us a legacy of unprecedented arbitrariness in the field of legal practice. For present purposes, the more or less futile question of whether the positivist or a non-positivist approach to law is to blame for this outcome can be ignored. In any event, it seems that a theoretical assessment in favour of positivism or non-positivism is not the issue. Attitudes at that time were dictated by political needs on the basis of a double strategy: in the case of pre-Nazi laws the strictness of positivist premises and the semantic limits of legal texts were totally disregarded in favour of actual national-socialist aims; on the other hand, in the case of Nazi statutes strict obedience was demanded even when this attitude would imply an overt contempt of fundamental principles of justice - a perverse version of positivism indeed. In view of this inheritance, it is only natural that all serious endeavours in legal philosophy immediately after the war aimed at overcoming legal arbitrariness. Those accustomed to looking at things in the historical perspective should have no difficulty in grasping the historical significance of this endeavour. The complexity of this task is due to the fact that it is neither possible to return to the school of classical natural law, nor is it possible to revive the legal positivism of the 19th century; one of the salient reasons is that both doctrines have proved incapable of dealing with the historical nature of law.

It was therefore necessary to search for an "*indisponible element*" (*Unverfügbares*) that could be *concrete* and *historical* at the same time. The idea was to look for it in the ontological area: the nature of things (*Natur der*

Sache), the inherent logical and ontological structures (*sachlogische Strukturen*), pre-existing institutions, etc. In the meantime, a scepticism has developed about it. All these attempts have proved to be in vain. This might be the reason why so many legal thinkers have been attracted by functionalism. In the first place there is nothing to object to here; it is a necessary attitude. Functionalism becomes, however, susceptible to serious objections when it turns out to be the *sole and exclusive* way to conceive legal phenomena, a way we encounter in Niklas Luhmann's approach to law. A functional conception makes law totally disposable and leaves it at the mercy of arbitrariness.

But is not the functional way of thinking the only alternative to the *ontological* one? Thinking in terms of ontology seems, to the majority of legal thinkers, to belong to the past - a lost case. Some of them, in fact, discovered a comfortable way to disqualify their opponents; they simply stigmatize them as "suspects of ontology", and they put this forward as a sufficient argument.¹ Their success is only illusory. What they actually do is to curtail the meaning of ontology, in pointing to a sheer substantial ontology. But this is mistaken use. The idea of ontology is rooted in the empirically based hypothesis that everything that grounds in Being is indisposable. Man can only dispose of the "Being" on the condition that he takes notice of its respective laws. And an indisposable element of this kind² need not be something substantial, it can also be a structure³ or a relation. With strict adherence to a substantial ontology having been definitely overcome, especially by Kant and Hegel, it seems hardly admissible that some still persist in using the term "ontology" in the sense of Aristotelian or Thomistic substantial ontology. In particular, since Charles Peirce, such use is no longer acceptable. In fact, it is Peirce who is today, after a long period of oblivion, hailed as "America's greatest philosopher", and "whose fame, equal to that of Leibniz and Aristotle, will not cease to inspire future genera-

Translated from German by Konstantinos Papageorgiou, Munich.

¹ See e.g. Hubert Rodingen: "Die Lehre von der Rechtsbeziehung: Eine neue Rechts-ontologie?", in *Rechtstheorie* 11 (1980), p. 208 ff.

² Cf. on this concept of "ontology" Ulfrid Neumann: *Rechtsontologie und juristische Argumentation; Zu den ontologischen Implikationen juristischen Argumentierens*, 1978, p. 1 et passim.

³ Cf. Heinrich Rombach: *Strukturontologie; Eine Phänomenologie der Freiheit*, 1971.

tions".⁴ He is the one who has actually accomplished the decisive turn from a substantial ontology to a relational ontology.⁵ According to many he is only a logician who found his way out of the classical Aristotelian "pure" logic in the direction of an intentional and modal logic understood as a semi-otic: a relational logic.⁶ This is true as well as important. Peirce expanded logic into fields that were unknown to Aristotle and Kant. Whereas for traditional logic only property-predicates were known, he opened the way to relation-predicates. This is a development of immense importance. But equally important is the fact that Peirce did not content himself with this discovery. Instead, he asked questions that went far beyond the realm of logic. This is the other reason why we may call him great. In fact, has there ever been a philosopher who was only a logician?

The question then is whether philosophy and theory of law reacted only too hastily by dropping the ontological problem and seeking refuge in functionalism because of the alleged impasse of substantial ontological thinking. The answer to the challenge relational ontology poses must still be sought in the field of law.

II

Classical natural law and classical (normativistic) legal positivism are similar in one respect. Both treat the process of realization of law as a thoroughly unhistorical process; a process where nothing happens. Case and law remain as they have always been, unaltered; a substantialist way of thinking. The process is purely deductive. The legal decision is deduced in a formally impeccable way; the statute on the other hand is derived from superior norms, and these emanate from the last and hierarchically highest one. The difference between classical natural law and classical legal positivism lies only in the fact that in the former the highest norms have a presupposed existence rooting in logos, nature, divine law, reason, while in the latter, the postulated

⁴ Elizabeth Walter: "Charles Sanders Peirce", in *Die Grossen der Weltgeschichte*, Vol. VIII, p. 692 ff. (698).

⁵ Important above all Peirce's *Collected Papers*, vol. 8 1931 ff.

⁶ Cf. Wolfgang Stegmüller: *Hauptströmungen der Gegenwartsphilosophie*, Vol 1, 6th ed. 1976, p. 431.

“basic norm” (*Grundnorm*) is understood as a product of human decision, as a hypothesis, or as a transcendental condition.

It is not necessary to engage in long discussions in order to prove that such a method, attributable to both classical natural law and classical legal positivism, which conceives of the application of law as a sort of subsumption, is totally unworkable and has never been actually practised. This is nowadays almost unanimously recognized. The highest norms are, though not totally devoid of meaning, too poor in content to produce, in a deductive process, the rest of the norms. There is always an empirical flow towards them. Even statutory law in its general provisions can never resolve a real dispute (case) in a direct manner and, in a sense, without a certain degree of uncertainty. A law is unequivocal in a true sense only when it uses numerical concepts. The application of law (a subsumption as a necessary but not as a sufficient condition) always demands the “preparation” of the norm in the face of the concrete case. A purely deductive logic has obviously reached its limits at this point.

Empirical legal positivism as well as some existentialist philosophies and situationalist ethics have tried another way, with the means of inductive logic. They want to reach a decision starting from the case, without applying a norm. Some rigorous logicians criticize inductions as scientifically dubious; jurists will nevertheless have to cope with that. After all, it seems impossible to proceed in legal method without a core of induction. Still it remains a puzzle as to how one can reach a normative decision *only* by means of induction based on the facts of the case: a puzzle that does not seem to have been solved by the exponents of this method.

It is not accidental, but of internal necessity, that Peirce, who developed a relational logic (in fact he does not stand alone there but is certainly one of the pioneers⁷), speaks not only of induction and deduction, but also of a third form of concluding, namely “*abduction*”⁸, sometimes referred to as “*retroduction*”.⁹ To understand this, one has to keep in mind that Peirce is one of the founders of *American pragmatism*. The central proposition of pragmatism is: “Consider what effects, that might conceivably have practical

⁷ Peirce has developed his logic of relations independently of similar efforts by Gottlob Frege, Bertrand Russell and Alfred Whitehead.

⁸ *Collected Papers*, 5, pp. 171 ff; 7, 121 ff. esp. 136 ff.

⁹ *Ibid.* pp. 5, 580; 6, 66; 6, 469 ff.

bearings, we conceive the object of our conception to have. Then our conception of these effects is the whole of our conceptions of the object".¹⁰ Peirce defines and specifies the meaning of a concept with regard to the practical consequences that follow from the acceptance of the necessity of this concept, with a view to the problems that can be by analyzed and solved by this assumption. The biblical saying, "by their fruits ye shall know them", was his sustained motto.¹¹ It is a utilitarian pragmatism, similar to the one advocated at that time (turn of the century) by William James and Oliver Wendell Holmes, Jr., also known as "instrumentalism", the main exponent of which was John Dewey. According to this tradition, highly reputed in the U.S.A., ethics are founded in life-experience and (natural) science, and are conceived of not as a discipline that is free of aims but as a means and an instrument that can serve life within the human community.¹²

It is easy to see why Peirce from his own pragmatic point of view (he himself called it "radical empiricism") should dispel a "pure logic" and remain rather indifferent to a deductive way of reasoning. Deduction leads, to be sure, to necessary conclusions but has a purely analytical character and does not lead any further. Induction and abduction, on the contrary, are synthetic reasonings, without providing, of course, necessary conclusions from the premises. However, besides induction, why do we also need abduction? Peirce's answer is the following: "Abduction is the process of forming an explanatory hypothesis. It is the only logical operation which introduces any new idea; for induction does nothing but determine a value, and deduction merely evolves the necessary consequences of a pure hypothesis."¹³ By

¹⁰ *Ibid.* 5, p. 402. Peirce uses the following formulation in 7, p. 219 to express this idea: "It appears that the intellectual significance of all thought ultimately lies in the effect upon our actions. Now in what does the intellectual character of conduct consist? Clearly in its harmony to the eye of reason; that is in the fact the mind in contemplating it shall find a harmony of purposes in it." See also Peirce, *Über die Klarheit unserer Gedanken* (introduction, translation, commentary by Klaus Oehler), 1968, 47 ff. On American Pragmatism, esp. on Peirce, cf. Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, Vol. 2, 1975, p. 275 ff.

¹¹ See *Collected Papers* 5, pp. 204 and 465.

¹² See for a recent assessment Robert S. Summers: *Instrumentalism and American Legal Theory*, 1982. Cf. also George E. Moore: *Philosophical Studies*, 1960, esp. p. 97 ff.; Jürgen v. Kempfski: *Charles S. Peirce und der Pragmatismus*, 1952; Klaus Oehler, *op.cit.* (*supra* note 10) pp. 11 ff., 113 ff.

¹³ *Collected Papers* 5, p. 171.

means of abduction we can attain new fields, i.e. new hypotheses. This is the decisive turn. Abduction precedes induction, delivering a basis of argumentation in the face of the abductively formed hypothesis, and forecasting the results of possible experiments.¹⁴ Abduction advances our knowledge by providing us only probabilities.¹⁵ Peirce's logic is a probability logic which can be, according to his pragmatism, nothing but that.

It is a well-known fact that science extensively uses deductive and inductive reasoning. Aristotle mentions *analogical reasoning* - also called mixed inductive-deductive reasoning, i.e., concluding from the known to the less known. In his *Rhetoric*¹⁶ he demonstrates this with the following example: "It is known that Peisistratos and Theagenes and many others like them asked for a bodyguard and, as soon as their request was granted, they became tyrants. Therefore one should conclude in the case of Dionysius, although one did not know his actual motives, that he also wanted a bodyguard in order to establish a tyranny." The known examples all fall here under the same general premise. Whosoever asks for a bodyguard seeks to establish a tyranny. The conclusion is drawn here, as Aristotle expounds, neither from a piece to a whole, nor from a whole to a piece, nor from a whole to a whole but from a piece to a piece, from a similarity to another similarity. "When both belong to the same class, albeit the one more known than the other, then this is an example." Example, model, type are cases to presuppose and express a general and common idea (ein *Allgemeines*, *Gemeinsames*), namely that all those who request a bodyguard seek to establish tyranny. That analogy serves as a formulation of a hypothesis is, of course, a familiar notion in logic. Christoph Sigwart, for instance, explicitly calls the analogy a heuristic procedure for the sake of the formulation of a hypothesis.¹⁷

¹⁴ Peirce makes the following remark in *Collected Papers* 7, p. 136: "Abduction ... is merely (in comparison with induction) preparatory. It is the first step of scientific reasoning, as induction in the concluding."

¹⁵ Cf. on Peirce's abduction: v. Kempster, *op. cit.* (*supra* note 12), p. 114.; K.T. Funn: *Peirce's Theory of Abduction*, 1970.

¹⁶ 1357 b, Cf. also *Second Analytic* II, p. 24.

¹⁷ *Logik*, Vol. 2, 5th ed., 1924, p. 307 ff., 600 ff. On the heuristic value of analogy cf. also Christian Thiel: "Analogie", in *Enzyklopädie Philosophie und Wissenschaftstheorie*, Vol. 1, 1980, p. 98 f.

Is abduction, in Peirce's sense, therefore a sort of analogical conclusion? Perhaps some would think so in view of my predilection for the analogical way of perceiving which I am inclined to follow.¹⁸ But I prefer to let Peirce himself take over. Here is a summary of what he is saying.¹⁹ One of the worst and most widespread mistakes in science lies in the fact that abduction and induction (very often confused with deduction) are not held apart. Abduction and induction have certainly something in common, that is, they both work with hypotheses. But they have completely opposed aims; they adopt almost opposite methods. Abduction starts from the facts without having preconceived a theory, though conscious of this fact and motivated by the fact that a theory is necessary in order to explain facts. Induction on the other hand starts from a hypothesis without having concrete facts in sight at the same moment; however it remains conscious of the indispensability of facts for supporting a theory. Abduction looks for a theory, induction for facts. Abduction consists in formulating a hypothesis by observing the facts. Induction aims at constructing a hypothesis, an experiment that elucidates facts suggested by the hypothesis. Now, the mode of "suggestion", that leads in abduction from the facts to hypothesis is *similarity* - similarity of the facts with the consequences of the hypothesis. "The mode of suggestion by which, in abduction, the facts suggest the hypothesis is by *resemblance* - the resemblance of the facts to the consequences of the hypothesis." The other way around, in induction, passing from the hypothesis to the facts, is described by Peirce as "contiguity" and "familiar knowledge".

I do not claim that Peirce's abduction is the same thing as analogy. But on the other hand, to hold that they are totally different is also fallacious. The condensed quotation from Peirce that I have given shows very clearly that abduction concludes from a part to a part in order to arrive at a hypothesis. But at the same time a theory is anticipated. Otherwise one could not perceive of the similarity.²⁰ Aristotle's "example" is certainly an abduction in Peirce's sense.

¹⁸ Cf. Arthur Kaufmann: *Analogie und "Natur der Sache"*; *Zugleich ein Beitrag zur Lehre vom Typus*, 2nd ed. 1982, esp. p. 29 ff. (English translation by Ilmar Tammelo, Lyndall L. Tammelo, Anthony Blackshield and Albert Foulkes: "Analogy and 'the Nature of Things' - A contribution to the Theory of Types" in: *Journal of the Indian Law Institute*, Vol. 8, No. 3, July-September 1966, p. 358 ff.)

¹⁹ *Collected Papers* 7, p. 136.

²⁰ Cf. also Kuno Lorenz: "Abduction" in *Enzyklopädie Philosophie und Wissenschaftstheorie*, Vol. 1, 1980, p. 28: "It is an abduction, when, having presupposed a general

But let us go back to the analysis of law and the procedure of its realization. As I have already mentioned, a purely deductive way of reasoning is not sufficient for legal methods, and an inductive one alone is also incomplete. The procedure is much more complex because of the interplay of empirical and normative moments, and because of the seemingly impossible combination of "is" (*Sein*) and "ought" (*Sollen*) in a simple syllogism. What happens by the application of law (that is, not just by the application of statute) is the following: On the one hand, what is needed is a construction of the case, i.e. the working out of the essentials of the case in the light of the norm; in other words, the formation of a legally relevant case (*Sachverhalt*). On the other hand, an interpretation of the norm is required, namely its concretization in the light of the particular case, the formation of the normative framework that can accommodate reality (*Tatbestand*). Through both acts of construction and interpretation that do not temporarily follow one another but rather coincide in a relation of mutual conditioning, a *correspondence* of case and norm in the form of a factual and a legal, normative framework of "*Sachverhalt*" and "*Tatbestand*" is accomplished. This correspondence does not exist in advance (although there is a tendency in that direction both in the case and the norm). It must be *produced* in a way that case and norm are made *to coincide* from the point of view of the *ratio juris* through an active, moulding, shaping act (coincidence-theory; quite similar is Wolfgang Fikentscher's²¹ "case-norm theory" according to which a case-norm must be built that represents case and norm, under which a subsumption can take place). Case and norm cannot coincide in a raw form because they stand on different category levels, namely, on an "is" (*Sein*) and on an "ought" (*Sollen*). A coincidence is only possible after the norm has been enriched with normative elements and the case with empirical ones so that they can identify each other. One can only subsume legally relevant facts under normative frameworks, "*Sachverhalte*" under "*Tatbestände*". It is not difficult to see that producing legally relevant factual frameworks and normative frameworks, "*Sachverhalte*" and "*Tatbestände*", is related with analogy or with ab-

proposition, we proceed from a 'result' to a conjecture of a specialization, an 'explaining hypothesis'." Very interesting are also Ernst Cassirer's related remarks: *Substanzbegriff und Funktionsbegriff; Untersuchungen über Grundfragen der Erkenntniskritik*, 1910, Reprint 1969, p. 333f. : "An authentic and truly fecund analogy lies ... not in the physical correspondence of the particular features but in the conceptual correspondence within the relation structure (*Relationsgefüge*)."

²¹ *Op. cit.* (*supra* note 10), Vol. 4, 1977, p. 129 ff., esp. 202 ff.

duction. Furthermore, it is also obvious that a *historical process* is also involved. For each case of the so-called application of the law, production must take place anew. Even the determination of a case as being the same as a previous one - strictly speaking only as a similar one - demands this way of reasoning, even if we are not always and in all respects conscious of what we are actually doing.

Realization of law, understood in these terms, is a shaping, moulding act. Norm and case are subjected to the law of historicity. Hermeneutically developed law is something else in relation to what it used to be "on the books". The same holds for the case, as a legally qualified case, which, by this qualification, acquires a new dimension. Where do the elements come from that cause these changes? In the first place, it seems that what provides for the historical development of law in the sense of a perpetual adaptation to reality are the very circumstances of living. But in the deep structure we discover that even the law must be in a certain sense prone to historicity in order to be flexible and open. Otherwise it would not be able to fit in the very circumstances of life. A rigorous and unequivocal law (however inconceivable it may be) would in its rigid and lifeless state be completely unhistorical. And a historical dimension can only exist with an *open system*.²²

Law in its strict sense is thus not only to be found in the norm or only in the case but in their mutual *relation*. Whether the abstract legal norm and the concrete case can be held to be "substances", "objects", before the assimilation is something that cannot be answered here. But they are definitely not normative framework ("*Tatbestand*" and "*Rechtsfolge*") nor a legally relevant factual framework ("*Sachverhalt*") because they exemplify the way norm and case *behave* to each other.²³ In fact, it is this relation that we call law. Law is, as I have said on another occasion, "a correspondence of the Is (*Sein*) and

²² See Claus-Wilhelm Canaris: *Systemdenken und Systembegriff in der Jurisprudenz*, 2nd ed. 1983, p. 61 ff; Fikentscher, *op. cit.* (*supra* note 10), Vol. 2, 1975, p. 64 ff.; José Llompart: *Die Geschichtlichkeit der Rechtsprinzipien*, 1976, *passim*, p. 190 f; "Arthur Kaufmann", in: Kaufmann/Hassemer (Ed.): *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, 4th ed. 1985, esp. p. 113.

²³ On the relational character of "*Sachverhalt*" (factual framework) cf. Hermann Krings: *Transzendente Logik*, 1964, p. 285 ff. On the relational character of *Rechtsverhältnis* ("legal relationship") cf. Norbert Achterberg: *Die Rechtsordnung als Rechtsverhältnisordnung; Grundlegung der Rechtsverhältnistheorie*, 1982, esp. p. 78 ff.

the ought (*Sollen*).²⁴ Law is not a substance; quite the opposite, it is a relation. But if law is relational, then its inescapable historicity must be founded on this relationality.

III.

Where is this indisposability of the relational to be located? What is a relation? We can roughly formulate it in this way? A *relation* is a basic form of logical and perhaps ontological character, a category that involves at least two relata which in turn condition each other in their spatial, temporal, material or semantic way of being (*Befindlichkeit*). Relata can be concepts (subject-object), things (cause-effect), mental states (noese-noema) or value-judgements (categorical, hypothetical or disjunctive value-judgements) depending on the kind of relation between subject and predicate.²⁵

There is a theory according to which reality consists mainly (perhaps only) of relations and not of substances (relationalism). Herbert Bradley argued that all relations are "internal" in that they affect the foundation of the relation. In other words, the relata would not be what they are without being set in relation to each other (in fact that is the opposite of the "external" relation which remains indifferent to the related objects). Bradley thus comes to the conclusion that everything in the world is related to everything; so that no object can be recognized as such.²⁶ Whether this is correct as a generalization is not relevant for our discussion. For the realm of law and for the other kinds of structured reality it is nevertheless absolutely true. Even Aquinas, we may recall, who was under the spell of a substantial ontology, clearly

²⁴ A. Kaufmann, *Analogie* (*supra* note 18), 18 (in the English translation: p. 372). Cf. earlier Alfred Löwenstein, *Der Rechtsbegriff als Relationsbegriff*, 1915, esp. pp. 17 ff., 23 ff.

²⁵ See Cassirer, *op. cit.* (*supra* note 20), esp. 313 ff.; Harald Höffding: *Der Relationsbegriff; Eine erkenntnistheoretische Untersuchung*, 1922; Wilhelm Burkamp: *Begriff und Beziehung; Studien zur Grundlegung der Logik*, 1927, p. 52 ff.; Rudolf Carnap: *Symbolische Logik*, 2nd ed. 1960, p. 114 ff.; Julius R. Weinberg: *Abstraction, Relation and Induction; Three essays in the History of Thought*, 1965; Günther Patzig: "Relation", in *Handbuch philosophischer Grundbegriffe*, Vol. 4, 1973, p. 1220 ff.

²⁶ I am referring to Patzig, *op. cit.* (*supra* note 25), p. 1226. On internal and external relations cf. also Moore, *op. cit.* (*supra* note 12), p. 276 ff., and Rolf-Peter Horstmann: *Ontologie und Relationen; Bradley Russel und die Kontroverse über interne und externe Beziehungen*, 1984, p. 31 ff., 145 ff., 169 ff.

recognized that "Ordo non est substantia sed relatio".²⁷ Law is a net of relations that all depend on, and condition, each other. This is an old insight: by applying a norm the totality of *all* legal norms is applied.²⁸ Peirce says: "But the cognition of a relation is determined by a previous cognition. No cognition not determined by a previous cognition, then, can be known".²⁹ Cognition in the realm of the relational is therefore necessarily analogous knowledge: a perpetual comparing and distinguishing. "Thinking in terms of a case" in the sense of method of a comparison of cases is therefore perfectly legitimate. One should only be cautious not to oppose it to "thinking in terms of a norm" because a comparison of cases without a standard of comparison - and in law this function is taken over by norms - would not be feasible.

The process of realization of law demonstrates that legal relations are internal ones. The relation "L" (law) is the connection between x (the case) and y (the norm) that only sustains when the proposition "xLy" is true. Without this relation the relata would not be what they are. When the norm and the case are lined up, that is, the case is construed according to the statutory norm (*Gesetz*) and the law is interpreted according to the case, this bringing into relation causes their mutual change. A unique *Tatbestand* and a unique *Sachverhalt* are being produced. (So both are, apart from this relation, something else by themselves). This amounts to an equation with three unknowns. That is why a certain "pre-conceived value-judgement" (*Vorurteil*), "background knowledge" or, in Peirce's sense, a certain "previous knowledge" is indispensable. We do not know what law means before we have first acquired a knowledge of cases (at least fictitious ones). And the legal character of cases is only disclosed through law, and what both relata actually are is decisively determined by the existing relation. What is this relation?

²⁷ *Summa theologica* I, p. 116, 2. On the relational character of "order" see Werner Maihofer: *Vom Sinn menschlicher Ordnung*, 1956, esp. p. 64 ff.

²⁸ Karl Engisch: *Die Einheit der Rechtsordnung*, 1935, p. 26. See for an earlier opinion Rudolf Stammler: *Theorie der Rechtswissenschaft*, 1911, p. 24 f, and Philipp Heck: *Begriffsbildung und Interessenjurisprudenz*, 1932, p. 107. Cf. further Arthur Kaufmann, *Analogie* (*supra* note 18), p. 56 f. (in the English translation; p. 400 f.).

²⁹ Peirce: *Schriften zum Pragmatismus und Pragmatizismus*, ed. Karl-Otto Apel, 2nd ed. 1976, p. 34; cf. also pp. 356, 416.

There are various kinds of relations in *the logic of the relation*.³⁰ Peirce himself was especially interested in the distinction of *one-place and more-place relations*. In legal theory, the importance of this distinction has hardly been examined. This, however, cannot be pursued here. I should like to stress the following point: Peirce argued that there are only three types of relations: one-place (monads), two-place (dyads) and three-place (triads) - four and more-place relations can, according to Peirce, be reduced to three-place relations. For present purposes, this is promising because we are provided with a way into the ontology of relations, into relational (instead of substantial) ontology.

Peirce's relations theory is closely related to his categories doctrine which also assumes three primordial categories: I, It, Thou (in his later terminology known as quality, relation, representation).³¹ What this has to do with my thesis will become clearer, I hope, below.

The distinctions of the semantic relation of "intention" and "extension" (Carnap³²) and of "sense" and "meaning" (Frege³³) have become far more attractive for legal theory. These distinctions - undoubtedly of great importance - are nevertheless not very promising for the purpose of discovering an "indisposable element" in the area of relationality. So we may ignore them.

We are coming closer by drawing on an Aristotelian distinction of *accidental relation* (*relatio accidentalis* or *praedicamentalis*) and *substantial relation* (*relatio essentialis* or *transcendentalis*).³⁴ If on a party ticket, "At" follows "As" because of the alphabetical order, this is an accidental relation. This, then, is clearly not the case in the relation between a case and a norm. But would it be a sufficient reason to speak of a substantial relation? Another distinction that differs from the previous one is the one between *cognitive* (*relatio rationis*) and *non-cognitive relation* (*relatio realis*). It is

³⁰ A clear exposition is provided by Ulrich Klug: *Juristische Logik*, 4th ed. 1982, p. 73 ff.

³¹ About Peirce's Logic of relations see especially *Collected Papers*, Vol. 3. Cf. to this also Doede Nauta: "Peirce's Three Categories Regained: Towards an Interdisciplinary Reconstruction of Peircean Frameworks", in Ketner (Ed.) *Proceedings*, 1981, p. 121 ff.

³² *Op. cit.* (*supra* note 25), pp. 39 ff., 98 f., 113 f.

³³ *Funktion, Begriff, Bedeutung*, Ed. Günther Patzig, 5th ed. 1980, p. 41 ff.

³⁴ Aristotle, *Categories*, 6th Chapter; *Metaphysics*, 5th book, 15 (1020 f. ff.).

obvious that here the old problem of universals, the dispute between realism and nominalism, comes into play. One can certainly deny the existence of substantial properties and relations. Günther Patzig, for instance, claims that the relation "being father", does not mean that a man has an "internal" relation to a child, but that we are entitled *to call* a person a "father" only in the case that "there is an X of the kind that X is a child of Y".³⁵ This example will most probably not make sense for most people; instead they will tend to accept that the relation father to child is a real and essential one. Applied to legal phenomena, nominalism nevertheless acquires a certain plausibility: Does the relation of case and norm, of normative framework (*Tatbestand*) and factual framework (*Sachverhalt*), actually consist *in re* and *essentialiter* or does it exist only *in mente*, and after all, perhaps only *per accidens*? In short, is "law" just a name which we apply to the respective relation, a relational "*façon de parler*", without the slightest correspondence to a *relational frame of facts* (*Sachverhalt*)?

In my opinion, legal nominalism of this form cannot be refuted. But on the other hand, it cannot be proved either. The decisive question is whether nominalism, consistently practised, can be *tolerated*. By their fruits ye shall know them! The fruits of nominalism in law can with good reason be regarded as being hardly digestible. Under its spell, law becomes totally variable. In Niklas Luhmann's symbolical conception of law and justice this is more than manifest; according to him, law cannot be legitimized as a system-transcending criterion but only by itself, during and through the legal procedure. In other words, law can be everything.³⁶

If law were to be only a relational way of speaking, without a relational frame of facts (*Sachverhalt*), bereft of an underlying proper object of law ("*Sache Recht*")³⁷ then the following relation would be a sound one: "X=legal subjects are only Aryans, and y=J is a Jew", therefore "xLy", that is, the Jew J is not a legal subject (has no legal capacity). This relation sounds *legally* impeccable only because it is *formally* established in the correct way. If one is not prepared to accept this monstrosity, one has to admit that no relation whatsoever between a case and a norm can be qualified

³⁵ *Op.cit.* (supra note 25) p. 1226.

³⁶ For a detailed analysis (with a bibliographical list): Kaufmann/Hassemer: *Grundprobleme der zeitgenössischen Rechtsphilosophie und Rechtstheorie*, 1971, p. 27 ff.

³⁷ On this issue see Joachim Hruschka; *Das Verstehen von Rechtstexten; Zur hermeneutischen Transpositivität des positiven Rechts*, 1972, esp. p. 56 ff.

as law. One possible objection, namely that the mistake lies in a relatum, the law, and not in the relation itself, fails to recognize the fact that injustice arises only after the *application* of a *lex corrupta*. Beside the usual cases of "unjust law" (*a contradictio in adjecto*) there are such in which a false relation is established between a right law and a rightly assessed case. In a word, the law is not duly applied.

But what does it actually mean not to apply the law in "the right way"? The relation "E=electricity is equivalent to T=a thing" is for instance a relation that people are usually inclined not to accept. But is this relation wrong in the necessary sense that "two times two = five" is wrong? Is there no way to describe electricity as a "thing"? Is it not possible to conceive electricity in the context of "theft" in the sense that everything that can be taken away (*wegnehmen*) is a "thing"? It is difficult to say a definitive "no" here. Then it seems possible that more than one relation could be "appropriate", could be "true". In law this is very often the case. In German law books and court decisions the relation "capacity of conceiving and bearing a child" ("*Empfängnis- und Gebärfähigkeit*") is equivalent to "capacity of procreation" (*Zeugungsfähigkeit*) (woman-man) is held to be a sound relation, though not in general but in respect to grave bodily harm (a typical case of interplay of relata and relatio).

What has been said so far implies that the relation "law" is always an *analogy*. That is why I still hold an opinion I expressed some twenty years ago: "Law is originally analogical".³⁸ One can formulate the cardinal question in the following way: Where are the limits of permitted analogy to be drawn? The question is relevant not only in criminal law; in fact there is no field of law where an unlimited analogy is permitted. After all, analogy has its own limits? were it to be freed from its real ties it would become a fiction.

If we do not wish the whole set of relations that depicts law to fall asunder; in other words, if we do not accept that everything can be variably called "law", then there must be an identity constituting phenomenon, conform to a mode of being (*Seinmäßiges*), and not to be manipulated *ad libitum*. This phenomenon should exist both within and outside the process of realization of law, it should guarantee its "lawfulness", and it should be by its very nature, relational, procedural and historical. It poses a question about the *ontological character of relations*, about *relational ontology*. It is, after all, a question about *reality*.

³⁸ Arthur Kaufmann: *Analogie* (*supra* note 18), p. 19 (in the English translation: p. 373).

IV

The question about *reality* has preoccupied great thinkers of all times. It was the main subject of discussion during the scholastic and late scholastic era. Peirce very explicitly and in detail resumed themes of the scholastic tradition. His main interlocutor, if we may say so, is Duns Scotus. Peirce himself describes his position in the following way: "My mother's milk in philosophy was Kant's "Critique of Pure Reason". But during the years of activity of the "Metaphysical Club" my Kantianism has been reduced to small dimensions. I dedicated myself to the writings of other great philosophers, Spinoza, Leibniz and the English classics, and especially to the study of the scholastics out of which I emerged as more or less a scholastic realist, though not yet a radical one, as I became only after deeper studies in the field. At the time I could not overcome the point of view of Scotus, an overdone, apologetic, faint-hearted realism, that I have abandoned a long time ago. Unfortunately I have not gone far enough to save myself from Mill's individualist nominalism."³⁹

The scholastic and Peircean discussion about reality was actually stimulated by the trinity speculation. Although the speculation is far from being adequate as a ground of philosophy or legal philosophy, some aspects of it still retain their interest.

A god conceived as pure substance is beyond the realm of human beings, he is the silent god, the "deus absconditus". If he is to come to a *relation* to human beings, to talk with them, he must be a *person*. The trinity speculation assumes that God, although a person, in fact three persons, is still a substance (*tres personae unius substantiae*; thus the 1st Council of Nicaea, 325 A.D.).

Peirce revives the number "three": three categories, three relations. And it is really remarkable how Peirce comes to speak of the three relations: I It, Thou, as of *three persons*.⁴⁰ This is perfectly true. *A person is a relation*, a person is the archetype of the relation, the prime relation. Friedrich Schiller⁴¹ speaks of the "person of things", referring to the jurist's rather

³⁹ Peirce: *Schriften* (*supra* note 29), p. 143 f.

⁴⁰ See for this issue above note 31. On the trinity speculation see also Weinberg, *op. cit.* (*supra* note 25), p. 86 ff.

⁴¹ Vorarbeiten zu "Kallias oder über die Schönheit". On the relational character of the "Nature of things" see especially Günter Stratenwerth: *Das rechtstheoretische Problem der*

vague expression known as the “nature of things”; if this is to make sense at all then it must be something relational, analogical.

But once again, what is the reality of the relation? What is its ontological status?⁴² Do relations exist at all? Is a “person” something real? In the scholastic tradition there has been a long and vivid debate on these matters, especially in the context of the trinity speculation. How can we conceive a substance (*deus unus*) and a relation (*tres personae*) as a unit? If we accept a *distinctio realis*, then God's unity, oneness, must be a logical one. If, on the other hand, we accept a *distinctio logica*, then its trinity is not real. Both ways led to unacceptable conclusions for the scholastics. Duns Scotus proposed a solution with his *distinctio formalis*.⁴³ We can have strong doubts on the plausibility of this solution. Yet the problem is genuine and still of great importance. Now, if we take reality to consist of particulars but, on the other hand, the human intellect is capable of grasping only general, universal ideas, then there is no intellectual possibility to conceive an individual particularity. Then we are only left with our intuitions.

This is the point of no return for Peirce; he goes beyond Duns Scotus. He asks himself how forecasts are made in science. Only realism can give him an answer “that will not sunder existence (of the objects of cognition) out of the mind, and being in the mind as to wholly inproportionable modes.”⁴⁴ This means that the reality of general concepts must be acknowledged and consequently the reality of the relations as well.⁴⁵

I do not regard such a conceptual realism as an acceptable one, but I cannot in this lecture explain why. I just want to point out that a rejection of conceptual realism does not necessarily lead to nominalism. If one refuses to

“*Natur der Sache*”, 1957, p. 24 ff. Löwenstein, *op. cit.* (*supra* note 24) p. 68 ff. has also pointed out the connection between law, relation and person.

⁴² Cf. Horstmann, *op. cit.* (*supra* note 26), p. 29 ff.

⁴³ Cf. this to Peirce: *Collected Papers* 8, p. 18.

⁴⁴ Peirce: *Schriften* (*supra* note 29), p. 119. On the problem of reality see also Peirce: *Klarheit* (*supra* note 10), p. 81 ff.

⁴⁵ Cf. Oehler (*supra* note 10), p. 132 ff; Apel, *op. cit.* (*supra* note 29), p. 453. I cannot discuss here the problem of “*possibilia*”. I wish only to stress that this problem has retained its actuality up to the present day. Cf. only Nicolai Hartmann: *Möglichkeit und Wirklichkeit*, 2nd ed. 1949; José Llopart, *op. cit.* (*supra* note 22), p. 34 ff. demonstrates that the scholastic theory of *actus* and *potentia* is an impediment for the grasping of historicity.

subscribe to a *distinctio realis*, supposedly existing between generality and particularity (essence and existence), this does not imply a recognition either of a *distinctio rationis (logica)* or of a *distinctio formalis*. I therefore speak of a "*distinctio rationis cum fundamento in re*."⁴⁶ The consequence of this reasoning consists in that we cannot perceive the "essence" of a thing in an adequate and exact manner but only in an analogical one. Now this is not the place to enter into a debate about whether speaking of "cognition" is a legitimate use of terms. From an epistemologically deviant point of view, we might rather speak of an "analogical grasping".

My type of distinction is based on a scientific reservatio? Given that I do not regard generality as real, I do not purport to claim the reality of the relations. I even go as far as to deny the reality of a "person as such". But a "person as such" is founded *in re*, it takes part in "Being".⁴⁷ If we do not want to submit to the view that all things are persons,⁴⁸ we may confine ourselves to a strict interpretation of personality, peculiar only to humans. But this does not mean that a human being and a person is one and the same thing. Humans in a substantial sense exist as a particularity, persons on the contrary are only conceivable among other persons; that is why law - at least in "Western" terms - is not conceivable just for one man but always in a "relation" of human beings to each other or to separate things - law is only for persons.

It should be said here that speaking of an *ontology of relations* by no means points to a conception of relations as real entities (that would be self-defeating). Relational ontology establishes the *indisposability* of relations (provided that they are not just external and/or accidental ones) due to the fact that they ground in "Being". In this way, an ontology of the relational can only be conceived as an *ontology of the personal* because a person is the *relatio pura*, the structural unity of relatio and relata.

Peirce was not the first to devote himself to the study of the ontology of relations. In Kant's philosophy, a person is no longer conceived of as only an object (Boethius still defined a person as *naturae rationis individua sub-*

⁴⁶ Further to this issue see Arthur Kaufmann, *Rechtsphilosophie im Wandel*, 2nd ed. 1984, p. 111 ff.

⁴⁷ Slightly different Horstmann, *op. cit.* (*supra* note 26), p. 184 ff.: Reality of Relations as "Subsistence"; cf. also p. 331 ff.

⁴⁸ Cf. Carl S. Popper, in: *Popper/Eccles: Das Ich und sein Gehirn*, 2nd ed. 1982, p. 145 f.

stantia) but as a relation as well.⁴⁹ But it was mainly Hegel who undertook the task of surmounting the objectified, substantial thinking (especially in law), and of advancing to a relational one. It is not surprising, therefore, that Peirce made the discovery of Hegel in his late period, as it should equally not be a surprise that contemporary American philosophy demonstrates a growing interest for Hegel. According to Hegel, the individual, not being a person as such, attains this quality only by developing his self-consciousness. It is here that the authority of the person is rooted. Accordingly, it is the personality (not the subject called man) that contains the legal capacity (*Rechtsfähigkeit*) and forms the concept and the "ground work" of formal law. The command of law is therefore: "Be a person and respect others as being persons."⁵⁰

This factor of respect and acknowledgement is of great importance for a person-related thinking. Fichte came to realize this.⁵¹ Popper points out that "the personality emerges in interaction with other selves and with the artefacts and other objects of this environment."⁵² In modern theories of sociology and political science, such as in the theory of the social world (*Lebenswelt*) developed by Andreas Schütz and Thomas Luckmann or in the theory of communicative action (Jürgen Habermas), an important role is played by the aspect of mutual expectability. A person can never be defined in terms of an individual alone; Max Scheler, in fact, calls the concept of an "individual person" a *contradictio in adjecto*.⁵³ A person is always constituted by others; others here being understood not in an objectified sense but in that a person understands himself by being related to others, in terms of

⁴⁹ In the "Metaphysik der Sitten", *Akademieausgabe*, S. 23, Kant says: "A person (contrary to a thing) is a subject whose actions are *attributable*."

⁵⁰ Hegel, *Grundlinien der Philosophie des Rechts - oder Naturrecht und Staatswissenschaft im Grundrisse*, pp. 35, 36.

⁵¹ Johann Gottlieb Fichte: *Grundlage des Naturrechts nach Prinzipien der Wissenschaftslehre*, Ed. Philosophische Bibliothek No. 256, p. 85 et passim.

⁵² Popper, *op. cit.* (*supra* note 48), p. 76. Cf. also Fichte, *op. cit.* (*supra* note 51), p. 73 ff.

⁵³ *Der Formalismus in der Ethik und die materiale Wertethik; Neuer Versuch der Grundlegung eines ethischen Personalismus*, 4th ed. 1954, p. 382. Cf. also Joseph J.M. van der Ven: "Recht, Mensch, Person; Eine rechtsanthropologische Anfrage an die Rechtsvergleichung", in: Winfried Hassemer (ed.): *Dimensionen der Hermeneutik; Arthur Kaufmann zum 60. Geburtstag*, 1984, p. 15 ff.

understanding the roles of other persons and vice versa. The relation of a purchase, for instance, implies that the purchaser understands not only the role of the vendor but also understands that the vendor understands his, the purchaser's, own role as well and vice versa.

Given now that a person is not objectifiable, there is no point in applying the *subject-object-scheme* in the realm of the personal - it has no validity here. A person is neither an object nor a subject⁵⁴ and therefore not accessible to objectified, static, unhistorical thinking. A person is *relational, dynamic, historical*. A person is not a state, but an *event*, a person is an *act*.⁵⁵ This applies to law as well. Law is not a set of rules, law *happens* in personal "relations"; if it does not happen we have perhaps laws, but not law. *Law comes into existence through an act.*

Man therefore is not a person "by nature". But where does this quality of being person emanate from? This is precisely the question of the *justitia distributiva*, the question of who actually bestows equality on people. There is room here for various speculations, e.g. having recourse to God, or to a transcendental "person as such", or to a fictitious original contract. Well, one must be very cautious here. Man becomes a person *by mutual acknowledgement of others being men* (thereby acknowledging law). Peirce's answer points in the same direction.⁵⁶ Of course, consensus cannot be the ultimate ground on which personality and law rests. But what remains of the personal quality of man and of law without respective acknowledgement?

Has everything now become available, disposable, again? In my opinion it has not. Given that person is a relation, a structural unity of *relatio* and *relata*, this provides the law with a procedural character preventing it, on the other hand, from assuming an unlimited variability. What identifies law as such is the question of whether man in his quality of a person⁵⁷ is being accorded with what belongs to him, the *suum iustum*. When the *suum iustum* is not granted (life, freedom, property to the underdog whosoever he or she may be), then law is not actually realized. The person, i.e. the personal rela-

⁵⁴ Cf. Hegel, *op. cit.* (*supra* note 50), p. 35.

⁵⁵ Thus Scheler, *op. cit.* (*supra* note 53), p. 397 ff.; Popper, *op. cit.* (*supra* note 48), p. 77; 560: Personality as "a product of its own free actions in the past."

⁵⁶ Cf. Oehler (*supra* note 10), p. 137.

⁵⁷ Cf. Lothar Philipps: *Zur Ontologie der sozialen Rolle*, 1963; he argues for a concept of person from the point of view of an "ontological attribution".

tionships of men to each other and to things, is the indisposable, the ontological element which identifies as a proper matter of law (not to be substantially understood) any phenomenon of the law. Because a person proper is historical, what is due from the part of law is historical but in no way arbitrary.

Certainly, founding the law on the idea of the person cannot prevent many legal questions from remaining controversial, from staying without a definite and correct answer (personal thinking is, at bottom, an analogous one). In order to produce answers which are intersubjectively valid and capable of general consensus, and to reduce the correct and plausible to the smallest number, a *discourse* is needed. In whatsoever way such a (rational) discourse may be defined, it is absolutely necessary to lay down an identical theme, an object as its proper basis, that differs from the discourse itself. Now, if the theme of a juridical discourse consists in law, the "good law", or at least "not the incorrect law", or in an open option whatsoever, then this discourse must be based on an identity guaranteeing content, on an "indisposable element" with which man as a person is unquenchably impregnated. Man as a person determines, then, the juridical discourse, not only its procedure, but its content as well. Man as a person incorporates finally the "how" and the "what" at the same time.⁵⁸

The *historical dimension* of the person precisely consists in being *relata* and *relatio*, in being the "what" and the "how" at the same time. There is allegedly conditionality and unconditionality, self-realization and self-alienation. But the falling asunder of these differences is met by summing them up in a structural unity, the person. If historicity of law - to be thought of, in fact, as analogous to the historicity of a person - is not to form just a frame of interpretation indifferently intertwined by history's ungracious hand, but rather the perpetual remoulding and reshaping of an invariable theme, then it must be grounded in human personality. The idea of law is the idea of man's quality as a person or it is nothing.

⁵⁸ Further to this Arthur Kaufmann, *Theorie der Gerechtigkeit; Problemgeschichtliche Betrachtungen*, 1984, p. 35 ff. See also the same in Kaufmann/Hassemer: *Einführung* (*supra* note 22), p. 113 ff.

PART 2

INTERPRETATION IN LEGAL SCIENCE

THE HYPOTHESIS OF NARRATIVE COHERENCE

NARRATIVE COHERENCE AND THE LIMITS OF THE HERMENEUTIC PARADIGM

JACQUES LENOBLE

INTRODUCTION

The theme of narrative coherence has become a recurrent one in contemporary legal theory. The most significant recent publications in the field bring this out. Suffice it to mention, as well as R. Dworkin's well-known ideas on the matter, the thought of Neil MacCormick,¹ A. Aarnio² and A. Peczenik.³ The emergence of this theme in current thinking about law is bound up with a deeper shift in legal theory, concerning the epistemological paradigm that governs it. It can also be linked with what is happening in other sectors of current philosophical thought.

Narrativist theory found its first field of application in philosophy of history in English-speaking countries.⁴ The issue then was to posit the structural identity of fictional narrative with historiography. At a more philosophical level, the significance of this narrativist model was essentially iden-

¹ Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press, 1978, pp. 106 ff.; "Coherence in Legal Justification" in *Theorie der Normen. Festgabe für Ota Weinberger*, Berlin, Duncker und Humblot, 1984, p. 37 ff.

² A. Aarnio, *The Rational as Reasonable - A Treatise in Legal Justification*, Dordrecht, D. Reidel, 1987, p. 196 ff.

³ A. Peczenik, "Creativity and Transformations in Legal Reasoning", *Theorie der Normen*, *op. cit.* p. 277 ff.

⁴ As regards the exception - an ambiguous one, to boot - constituted by the French historian Paul Veyne, see P. Ricœur, *Temps et Récit*, t. 1, Paris, Seuil, 1983, p. 239.

tified and developed by two contemporary philosophers, P. Ricœur in France and H. Arendt in the United States.

These two reference "contexts" of the theory of narrative coherence in legal reasoning can perhaps help us see the implications and philosophical presuppositions of the approach somewhat better. With an eye to that, we wish to posit a twofold hypothesis.

1. The first hypothesis concerns the present state of legal theory. As we shall see, it has, since Hart, been attempting to make the hermeneutic paradigm prevail in its approach to its object. However, this epistemological approach is at present giving rise to two orientations, amply brought out in the debate around Dworkin's theory of narrative coherence (see below on the debate between MacCormick, Aarnio and Dworkin). We shall seek to show that a consistent reading of the needs of the hermeneutic paradigm, as can be found expressed notably in Habermas's interpretation of the rationality of normative discourse, leads to endorsing Dworkin's narrativist theory of law.

2. Our second hypothesis, however, involves making qualifications to the Dworkin model. Our argument here is a two-stage one.

Firstly, is there not a need to note various indications of the limits to which contemporary hermeneutic interpretations lead? We shall point out three of them.

A first indication might be seen in the difficulties that some of the best theoreticians who support a hermeneutic reading of law, such as MacCormick and Aarnio, seem to be finding in identifying the philosophical implications of the paradigm for the theory of practical reason. This fact is attested by the debate around Dworkin mentioned above, and by the ambiguity of these authors' attempts to reconcile hermeneutics and empiricism, or hermeneutics and scepticism or ethical non-cognitivism.

Conversely - and this is our second indication - the critique of Dworkin by those authors, even if it seems to us to be incorrectly founded, does nevertheless illuminate some ambiguities of Dworkin's theory of narrative coherence. Is there really no reality about the traces of dogmatism that MacCormick and Aarnio think they can discern in the theory? Everything seems in fact to be happening as if the theoretical opening that Dworkin's theory seems to us to constitute in the study of legal discourse has remained a prisoner of unforeseen limits. Though it is the advanced post in contemporary thinking about law, the narrativist theory nonetheless itself seems opaque to the ultimate consequences of its own approach.

Even though Habermas's theory of formal pragmatism justifies, as we shall see, the narrativist interpretation of law and the analysis of legal rea-

soning that it leads to, Dworkin in no way draws the consequences of this pragmatic theory for the judge's operation of legal definition. By not perceiving that this is to be defined as a pragmatic rather than a semantic operation, Dworkin sometimes risks falling prisoner to an interpretation of the operation of judging as an operation of subsumption.

This is undoubtedly something unseen by Dworkin, for if contemporary philosophical analyses of the narrativist model are followed, they lead to just such a pragmatic reading of the theory of interpretation. The recent work of P. Ricœur is, as we have sought to show elsewhere,⁵ among the most fertile for legal theory in this area. I further feel that this oversight of Dworkin's is also expressed in the ambiguity of the relationship he posits between the judge's need to satisfy the "test of appropriateness" and the possibility he has of doing justice to the "needs of public morality".⁶ Far be it for us to criticize Dworkin's theory; we merely feel that it does not adequately construct the purely regulatory character, in the Kantian sense, of the idea of narrative coherence, even though that is postulated by his own narrativist model.

On this point, then, Dworkin would benefit from having his reconstruction of legal reason extended and radicalized by Habermas's contemporary thought on formal pragmatism and the communicational analysis of "moral and practical rationality" (normative discourse). This brings us to the third of our indications of the symptomatic limits to hermeneutic interpretations of law.

The third indication can be found in Habermas himself. Without overlooking the profound divergence separating Gadamer's hermeneutics from Habermas's communicational model, we shall nevertheless show below (see Section 2 below) why we call the latter hermeneutic. Here let it suffice to note the apparent paradox that affects Habermas's approach to law. We just pointed out that Habermas's epistemological development of hermeneutics and the rationality proper to normative discourse allow us to show in what way Dworkin's theory of narrative coherence seems to be the most adequate

⁵ On this see our article "Philosophie contemporaine du droit et modèle herméneutique", in *Etudes d'anthropologie philosophique*, 4, Bibliothèque de l'Institut Supérieur de Philosophie, Louvain, Editions Peeters (forthcoming).

⁶ Hence too, we feel, the ambiguity of his relationship between legal judgement and political judgement: how to conceive the differences between the criterion of public morality and the utilitarian criterion in a model of rationality that links validity and interpretation.

version of a hermeneutic philosophy of law.⁷ Conversely, however, Habermas himself remains riveted to Weber's analysis of law, which reduces legal rationality to the model of "cognitive-instrumental rationality". Though he acknowledges, following Alexy, the "argumentative" rather than "strategic" character of legal debate,⁸ Habermas, here again following the Kantian model of the operation of judging, retains an allegiance to a "syllogistic" reading. Habermas, though he never gives up justifying the perverse effects of semantic analyses of rational action, misses the specifically pragmatic aspect of legal action, even though he has brought that aspect out so well in his more general analyses of the rationality of practical discourse.

The three indications we have just rapidly pointed to had merely the aim of introducing the second hypothesis we wish to put forward in this article. We shall, moreover, confine ourselves here to developing only the properly philosophical presuppositions of this hypothesis, leaving for other articles the explication of the aforementioned indications and the analyses they call for in respect of the approach used in legal reasoning.⁹ Our second hypothesis is that these indications represent a fundamental limit to the hermeneutic paradigm that the theory of language that is bound up with it helps to bring out. Our intention is not to bring the hermeneutic model into question as such, but to show its insufficiency. If, by comparison with other epistemological paradigms, hermeneutic philosophy admirably locates the possibility-condition of the order of meaning, it nevertheless misses the possibility-condition of the order of discourse within which the order of meaning is constituted. It is, we feel, through missing this second aspect - which can be revealed only by a refined approach to language - that the hermeneutic philosophies, even such innovating ones as Dworkin's in law, or Habermas's at the more general level, retain in various degrees traces of the dogmatism to which a syllogistic approach to the operation of judging or, which amounts to the same thing, inadequate consideration of the ultimate consequences of the argumentative and pragmatic character of the operation of legal definition

⁷ This will, as already stated, be developed in Section 1 below.

⁸ On this see J. Habermas, *Théorie de l'agir communicationnel*, t.1, French translation by J.M. Ferry, Paris, Fayard, 1987, p. 408, note 63.

⁹ See in particular, for an initial sketch of the extensions that the narrativist approach to law would allow for a theory of legal reasoning, our above-mentioned article "Philosophie contemporaine du droit et modèle herméneutique".

which is central to legal reasoning, lead. The plan of this article follows logically from the foregoing introductory remarks.

In our first section we shall seek to show how the hermeneutic paradigm, which has rightfully become dominant in contemporary legal philosophy, leads to endorsing Dworkin's theory of narrative coherence.

Without developing this narrativist model here,¹⁰ we shall in a second section content ourselves with showing the limits to the hermeneutic paradigm because of the language-theory model underlying it.

SECTION 1. THE THEORY OF NARRATIVE COHERENCE IN LAW: THE DWORKIN/MACCORMICK DEBATE

1. *Hermeneutic method and theory of narrative coherence in law.*

Neil MacCormick states, following Hacker, that "Hart's primary distinction as a legal theorist is that he introduced the hermeneutic method to our jurisprudence".¹¹ This observation has a twofold scope.

Firstly, it is aimed at qualifying Hart's epistemological viewpoint. True as it is, it nevertheless raises hard questions as to whether Hart brought out all the consequences of the hermeneutic viewpoint for both the nature of legal theoretical propositions and the descriptivist ideal of legal science. That is, however, not what we are thinking about here.

MacCormick's remark is important on another level. Over and above Hart's thought, it picks out what, since Hart, has been running through the field of legal philosophy, orienting its statements, regulating its objects of discourse and governing its concerns and the various answers offered. Everything in legal thought, essentially since Hart - though cut-off points in the history of ideas are always arbitrary - has been happening as if the most representative legal theoreticians were henceforth intending to modulate their

¹⁰ For these developments, see our article cited, "Philosophie contemporaine du droit et modèle herméneutique", and also, for the expressions this model adopts in contemporary political philosophy, see our work, forthcoming in 1988, A. Berten and J. Lenoble, *Dire la norme*, t.I, *Les paradigmes en présence*.

¹¹ N. MacCormick and O. Weinberger, *An Institutional Theory of Law - New Approaches to Legal Positivism*, Dordrecht, Reidel, 1986, p. 135. See also N. MacCormick, *H.L.A. Hart*, London, Edward Arnold, 1981, p. 38; P.M.S. Hacker, "Hart's Philosophy of Law", in P.M.S. Hacker and J. Raz (eds.), *Law, Morality and Society*, Oxford, Oxford University Press, 1977, pp. 12 and 13.

epistemological positivism by raising the issue, an old one in Continental philosophy, of Dilthey's distinction between explicating and understanding, between *Geisteswissenschaften* and *Naturwissenschaften*.

As Aarnio explicitly tells us: "legal dogmatics is not an empirical science as far as the confirmation of the norm statements is concerned. It deals with language, with the meaning of the statutes. In this regard, legal dogmatics is interpretative as to its nature and it belongs to the same family of research as the human sciences (*Geisteswissenschaften*)."¹²

This progressive realization by legal theory, though behindhand by comparison with other areas of philosophical thought, of the hermeneutic nature of its approach reflects, one might say, the new pregnancy of the hermeneutic paradigm in our field of knowledge. The legal theoretician's approach is perceived as not reducible, either to that of the scientist operating the empirical, formal sciences¹³ or to that of the dogmatic moralist with access to the moral order of truth, wielding his mastery of the ultimate meaning of the normative order. There has at last been a disclosure, however sketchily, of the hermeneutic circle in which the relationship between the legal theoretician and his object of study is played out, namely the problem of identity between subject and object: "The object can be apprehended only through instruments of understanding furnished by the subject, but the way in which the subject develops these instruments is itself determined by the whole of the situation; and it is precisely that situation that constitutes the object studied, which one seeks to understand."¹⁴

To take note of this progressive incorporation of hermeneutics into contemporary legal thinking, however, takes one rather far: it is not certain that the reorganization of that thought which the paradigm leads to has been fully carried out. This progressive incorporation does at any rate throw light on

¹² A. Aarnio, *op.cit.*, p.199.

¹³ On this see V. Villa, "Legal Science between Natural and Human Science", *Legal Studies*, vol. IV, 3, Nov 84, p. 264 ff.

¹⁴ J. Ladrière, *L'articulation du sens*, vol. I, Paris, Édit. du Cerf, 1984, p. 46. As he points out, the hermeneutic circle is manifested also in another way, particularly suggestive for the classical issues of the descriptivist or otherwise character of the "science" of law and of interpretation in law: "the knowledge that one acquires of the object modifies the latter, and in consequence modifies the interpreting subject himself". As Ladrière states, "this is however nothing but a variant of the fundamental problem". (*ibid*).

several current features of the debate that constitutes current thinking about law.

Law is caught up in the crossplay of the question of meaning; hence, thinking about law becomes an approach to understanding, a grappling with the object of any interpretive technique, the identification of a meaning. One might say that law escapes from the area of univocality of meaning where the human mind often sought to confine it, either through a certain intuitionist or rationalist *jusnaturalism*, or through a normativist or sociological *juspositivism*. Law becomes bound up with expressions with twofold meanings, such as Ricœur has rightly pointed to as constituting "the hermeneutic field proper".¹⁵ Law is expressed only in symbolic forms,¹⁶ and hence, for its elucidation and "description", requires an understanding approach.

Let us first note that the emergence of this new paradigm in legal theory does no more than reflect a broader phenomenon. J. Habermas¹⁷ thus stresses that the arguments of hermeneutic philosophy have in the 1960s become "the research paradigms in the social sciences", and more especially in anthropology, sociology and social psychology. With Rabinov and Sullivan, one may in connection with the emergence of this new paradigm speak of an "interpretive turning-point".¹⁸ This paradigm shift in legal theory is not without links on the one hand with the philosophy of ordinary language in connection with which it came about, and on the other with the renewed interest in the discipline that has been aroused. It is here that we again find the theme of narrative coherence. Let us go back over this twofold phenomenon a little.

¹⁵ P. Ricœur, *Le conflit des interprétations - Essais d'herméneutique*, Paris, Le Seuil, 1969, p. 16.

¹⁶ We use the term symbolic in the same sense as it is used by P. Ricœur: "I call symbol any structure of meaning where a direct, primary, literal meaning additionally designates another indirect, secondary, figurative meaning that cannot be apprehended except through the former". (*ibid.*)

¹⁷ J. Habermas, *Morale et Communication - conscience morale et activité communicationnelle*, French trans. By C. Bouchindhomme, Paris, Ed. du Cerf, 1986, p. 42.

¹⁸ P. Rabinov and W.M. Sullivan, *Interpretive Social Science: A Reader*, Berkeley, University of California Press, 1979.

1. To be sure, legal hermeneutics, understood as the science of interpreting legal texts, is very old. It can be traced back to Aristotle, and went through a redeployment, not to say official birth, in the middle of the 17th century.¹⁹ The emergence of the hermeneutic paradigm in legal theory has a quite different scope. The point here is no longer the interpretive practice of the legal practitioner, but the noting of the interpretive position of the legal theoretician, i.e. of the person claiming to furnish an account of what law is in a given social system.

The fact that it was from within "analytic jurisprudence" - i.e. a legal philosophy permeated by English-speaking ordinary-language philosophy - that the "interpretive turn" of legal theory came is not surprising. It has in fact been seen how far the hermeneutic dimension is bound up with symbolic phenomena, with interpretation being nothing but "the work of thought consisting in deciphering the meaning hidden behind apparent meaning, in displaying the levels of meaning implied in the literal meaning".²⁰ That is to say that language is here perceived, apprehended, not as the locus of an assured, or assurable, transparency, but on the contrary as that of a constitutive opacity, bound up with expressions that have multiple meanings. Hermeneutics is bound up with a logic of double meaning, a logic of equivocality. But this equivocality is not the "equivocality through confusion of meaning that logic drives out"; it is the "equivocality by excess of meaning that the exegetic sciences meet up with".²¹ Here, note is being taken of the fact that language can have manifold meanings. Hence the intimate link between hermeneutics and the analysis of ordinary language. For as Ricœur, the best thinker on the link between phenomenology renewed through hermeneutics and the philosophy of ordinary language, again notes, if the semantics of expressions with multiple meanings that characterizes hermeneutics "is opposed to theories of metalanguage that seek to reform existing languages in terms of ideal models, it is on the other hand engaged in fruitful dialogue with the doctrines that emerged from Wittgenstein's *Philo-*

¹⁹ "The notion of hermeneutics, conceived as a discipline or technique of interpretation of sacred, legal or literary texts, did not emerge until the mid-17th century, in Germany. (J. Dannhauser, *Hermeneutica sacra sive methodus exponendarum sacrarum literarum*, 1654") J. Starobinski, foreword, in F. Schleiermacher, *Herméneutique*, French Trans. by M. Simon, Geneva Edit. Labor et Fides, 1987, p. 6.

²⁰ P. Ricœur, *op. cit.*, p. 16.

²¹ *Ibid.*, p. 23.

sophical Investigations and ordinary language analysis in the English-speaking countries".²² From being analyzed through the filter of ordinary-language philosophy, law has come to be perceived as bound up with linguistic expressions of a symbolic nature. Hence the new perspective that did no more than start to flower in Hart: the viewpoint on law is necessarily a viewpoint of understanding, a hermeneutic viewpoint.

2. This paradigm shift is not without consequences for legal philosophy. A number of these are still only beginning to unfold.

Firstly, it may be noted that this epistemological change has been accompanied by renewal of interest in the discipline itself. It is not only that, as pointed out by the editors of the *Law and Philosophy Library* collection published by Reidel, "during the last half of the twentieth century, legal philosophy has grown significantly". Moreover, in the same movement it has fed anew on more general philosophical thinking, in order progressively to abandon - in a movement that is still proceeding and should be supported - the terrain of dogma alone, which jurists had imposed on it for a century. The same change is, finally, certainly a link also with a transformation in our socio-political framework, bound up with the very logic of the Welfare State, which queries the organization of the function of judging.

However, what interests us more directly in this article is a reorganization of the range of problems that seem to be thrown up by the epistemological paradigm shift in legal theory.

From this viewpoint, two features of the contemporary debate seem to be expressive. On the one hand, the question of the rationality of legal reasoning seems, in its very principle, to have become the implicit object of thought, as if emergence of the hermeneutic paradigm had brought about a vacillation in the very foundations of legal experience. On the other hand, legal thinking is shot through by a resumption - on renewed foundations - of the question of the descriptivist ideals of legal theory and of truth in its relationship with the legal norm. It is in regard to the second question that one might cite the Dworkin-MacCormick debate for its exemplary character. Before considering what has been going on in that debate and the consequences we may draw from it for our own thinking, let us first of all return to the first question.

Legal theory - though still very embryonically - seems progressively, and often implicitly, to be incorporating the crisis of reason at which, both on

²² *Ibid.*, p. 19.

the Continent and in English-speaking countries, twentieth century philosophy has arrived. Be it within analytic philosophy or within phenomenology, the link between language and reality has been brought into question, and hence the identity of the foundation in which theoretical and speculative reason had never ceased to find the guarantee for its project of self-elucidation. Both Wittgenstein's trajectory and the Heideggerian tradition end up with an approach of de-construction. By different paths, both of these perspectives lead to the finding that "language, in virtue of its very structure, is incapable of making itself in any way that might be totalizing, of changing itself in its fundamental possibilities".²³ J. Habermas likewise notes: "Pragmatic philosophy and hermeneutic philosophy are, as regards the claim of philosophical thought to foundation and self-foundation, expressing much deeper doubts than those expressed by any critical thinker whatever among the heirs of Kant and Hegel. In reality, they go beyond the horizon in which the philosophy of consciousness moves, with its cognitive model oriented towards perception or towards the representation of objects. In place and instead of the isolated subject approaching objects and, in a reflexive act, making himself into an object, these philosophies put forward the idea of knowledge mediated through language and aimed at action...."²⁴ What emerges through what we call the "linguistic turn", at least through the one bound up with the philosophy of the later Wittgenstein, is the questioning of the founding claim bound up with the cognitive function of consciousness and the representative function of language. This crisis in foundations may lead to two possible stances, if we except irrationalist ones.

A first stance, which we shall identify as that of the hermeneutic solution, found its clearest expression in Habermas and Apel. (We shall add - see below - the hermeneutic philosophy, in the strict sense, of Gadamer and Ricœur). The point here is to find, in the intersubjective model of communication and in the model of understanding of meaning bound up with it, the locus of the restoration of the possibilities of rational, well-founded discourse. The locus of language where all action and all relationship with the world is played out becomes that whereby the possibility of a finalized search for meaning and truth can be recovered. What risked being lost - the search for conditions of the unconditioned and for the linkage of meaning with the guarantee of truth - is recovered, no longer in a philosophy of con-

²³ J. Ladrière, *L'articulation de sens*, vol. II *op. cit.*, p. 213.

²⁴ *Op. cit.*, p. 31.

sciousness or in a representationist perspective, but in the very locus of the linguistic conditions of the elaboration of meaning.

A second and more radical attitude seeks to take account more effectively of the limits, not to say the paradox, revealed by the analysis of language. Here what is posited is that the restoration through the hermeneutic paradigm, as a horizon of meaning, of a locus of identity between world and language, a locus of identity between self and self, misapprehends the critique of the illusions borne by speculative or empiricist philosophy that is announced and pointed to by hermeneutic philosophy and pragmatic philosophy. We shall come back later to this second position, which is our one.

The hermeneutic paradigm that is at present reorienting the philosophy of law is the object of an interpretation that is very generally in conformity with what we have called the Habermasian approach (or depending on the case, in a more restrictive version, the Gadamerian approach). This attitude, as we have said, denotes at the same time the experience of a break in the foundations of reason and a certain response to it. This is, it would seem, indeed the situation of current thought. There is present, in legal philosophy after Hart, an entirely new vitality in thinking about the need for rationality in justification of legal decisions. Everything is happening as if there was a sense of the precariousness of the old fundamental guarantees of legal reasoning. Even where previously formalism was not there to provide assurance that the decision of justice was unconditioned, other agencies of guarantee were set up. Is the scientistic ideology of American realism not an expression of this? At the present time, the old guarantees - the rule, the normative fact (Gurvitch), etc. - are no longer enough. The decision applying the law is increasingly perceived as a performative act for which the intersubjective framework in terms of which it is accomplished constitutes the agency of final justification. Still more, whether it is in Dworkin, Aarnio, McCormick, Peczenik or whoever, the very question of the need for rationality in argumentation is becoming a question. The emergence of the question is a trace of the consequences of the hermeneutic paradigm for the self-foundational requirement of the discourse of reason. Moreover, the theory of narrative coherence (in its various versions), and more specifically of "rational acceptability as regulative principle for legal dogmatics", is the expression of the properly hermeneutic solution to the questioning of the fundamental discourse brought by the "linguistic turn" particularly in legal experience.

This brings us to our second observation on renewal of the approaches generated by the "interpretive turn" that legal theory is going through at present - at the very least since Hart. This second observation will additionally help to explain to some extent the consequences of the hermeneutic paradigm that legal thought has adopted as a way of responding to the crisis

in the foundations brought by the "interpretive turn", induced by both the development of Continental philosophy and the "linguistic turn".

The hypothesis we wish to develop here is as follows. While at present a significant majority of theoreticians of legal reasoning adopt the theory of necessary coherence in the justification proper to legal reasoning, this theory finds a special expression in Dworkin. We shall call the latter the theory of narrative coherence. This is bound up with an epistemological presupposition specified by a twofold characteristic: the questioning of the descriptivist project of legal positivism and the assertion of a link with a theory of moral truth. This theory of narrative coherence and its two presuppositions were the object of a celebrated controversy between Dworkin and MacCormick. We shall seek to show how Dworkin's position - on these two points exclusively - seems to us to be more consistent with the hermeneutic paradigm on which the other legal theoreticians mentioned, including MacCormick, seek to base themselves in thinking about law. Let us finally note that our argument will also bring us independently to locating the argumentation developed by Aarnio on the same topics.

The theory of coherence in legal reasoning is at present being explicitly stated by the most significant authors. MacCormick puts it thus: "In legal justification there are two distinct sorts of test for coherence: the first, which we may call the 'normative coherence' test, has to do with the justification of legal rulings or normative order; the second, which we may call the 'narrative coherence' test, has to do with the justification of findings of fact and the drawing of reasonable inferences from evidence."²⁵ As indicated by the same author, "coherence can usefully be distinguished from consistency A set of propositions is mutually consistent if it can without contradiction be asserted in conjunction with every other and with their conjunction By contrast coherence ... is the property of a set of propositions which, taken together, 'makes sense' in its entirety."²⁶ Normative coherence thus means reference of the whole set of rules and normative propositions to values and principles that assure a coherent representation of a desired mode of life: "The coherence of norms is a matter of their 'making sense' by being rationally related as a set, instrumentally or intrinsically, either to the realization of some common value or values; or to the fulfilment of some

²⁵ N. MacCormick, *Coherence in Legal Justification*, *loc. cit.*, p. 37.

²⁶ *Ibid.*, p. 38.

common principle or principles.”²⁷ Without weighing ourselves down here by going into narrative coherence in MacCormick's sense - i.e. the sense that concerns not legal norms but the description of facts at dispute - we would nevertheless note this important distinction brought out by him: “... although there are ... parallels and connections between our two sorts of coherence, there remains an important difference. Narrative coherence has to do with the truth or probable truth of conclusions of fact. But, there is no analogous reason for believing in some sort of ultimate objective, humanity-independent truth of the matter in the normative sphere. Coherence is always a matter of rationality, but not always a matter of truth.”²⁸ We shall see below the importance of this conception for the debate we shall be concerned with.

A. Peczenik and A. Aarnio conceive the problem of coherence in law from essentially the same perspective. Thus, Peczenik states: “Good reasons (in legal reasoning) fulfil the demand of logical consistency and are oriented towards two regulative ideas, the idea that one should be able to express both description and evaluation generally.”²⁹ The same is true of A. Aarnio.³⁰

Dworkin's theory of narrative coherence in many respects blends the three above-mentioned positions; however, it has a number of characteristic features which explain, though do not justify (see below), the criticisms currently directed against it. We shall present this thesis and its characteristics, at the same time considering the criticisms made by MacCormick and Aarnio.

One terminological observation is needed at the outset. The term narrative coherence in Dworkin does not have the restrictive meaning given to it by MacCormick. Instead, the term is similar to what the latter means by normative coherence; coherence applied to the legal system itself. The thesis is often called by Dworkin the thesis of the unity of law. He says, for instance: “The principle of unity in law as a decision-making principle is addressed to

²⁷ *Ibid.*, pp. 41-42.

²⁸ *Ibid.*, p. 53; from this same viewpoint, MacCormick states elsewhere that “coherence concerns the derivability of a novel decision or ruling in law from the preexisting body of law, not the ultimate defensibility of the decision or ruling from a moral point of view” (p. 47).

²⁹ A. Peczenik, “Creativity and Transformation in Legal Reasoning”, *op. cit.*, p. 288.

³⁰ *Op. cit.*, pp. 198-201.

judges and to other authorities charged with applying the public norms of conduct of a political community. It enjoins them to read and understand these as far as possible as if they were the work of a single author, the community personified, stressing a coherent conception of justice and equity. The outcome is the following criterion of what makes law: a legal proposition is true if it appears to be the best interpretation of the legal process as a whole, including both the whole set of basis decisions already taken and the institutional structure, or if it follows from such an interpretation."³¹

The model of legal decision thus brought under the principle of law as a unity may be clarified in two ways.

Firstly, this conception, Dworkin points out, differs from conventionalism and pragmatism. According to these two approaches, the task of judges in no way consists in a task of interpreting law in general. For conventionalists, the judge has to study collections of case law and official journals in order to disclose the rules adopted by the authorities competent to promulgate them. Undoubtedly, the norms thus disclosed sometimes call for interpellation. But this is not an interpretation of law as a whole. Conversely, pragmatism calls upon the judge to consider what rules would be the best ones for the future: "this exercise is oriented towards the future, not the past". This may call for interpretation of a principle lying outside legal matter, such as the utilitarian criterion of the greatest good of the community. But it does not rest upon an idea of interpreting law as a whole. Conversely, Dworkin's theory of narrative coherence implies that, just like a legal technician, the judge proceeds by comprehensively reinterpreting previous legal practice: hence the question of the interpretive model.

In order to clarify the method to be followed in this comprehensively interpretive work of the judge, Dworkin both proposes an analysis and defines a twofold rule. To explicate the method of legal reasoning, Dworkin refers to the hermeneutic model that defines literary practice or the practice of the historian. The judge would then be in a position identical to that of a novelist who has to add a chapter to a novel begun by others while ensuring that the ongoing story is the best one possible. Hence the twofold rule that defines interpretive practice, which Dworkin calls the criterion of fitness and the criterion of value.

The criterion of fitness - where the interpretive constraint expressed by the idea of narrative coherence appears in its proper sense - consists in the following: the judge must decide the case using a rule that emerges from the

³¹ R. Dworkin, "La Chaîne du droit", in *Droit et Société*, no. 1, 1985, p. 51.

best interpretation of past legal history. In doing so, then, he must collect the whole set of rules, precedents and principles liable to be concerned in the case in point, and determine which is or are the interpretations that ensure respect for past legal history: "Just as a novelist engaged in a chain work must, if he can, find a coherent vision of the characters and the theme as if a hypothetical single author with the idea could have written the part of the novel already done, Hercules³² must if he can find a coherent theory of law (on the point at dispute in the case) which would have allowed a single political authority that had adopted it to give the cases that can be seen to be precedents the solutions given by the judges who in fact decided them."³³

The criterion of value seeks to decide between the various interpretations that the judge finds possible on the basis of the first criterion. Among these various interpretations the judge will choose the one he regards as most in line with the requirements of political morality: the one among the possible histories that "shows the community in a better light, all things considered, from the point of view of political morality in general."³⁴ Here again we find the analogy with the literary endeavour, though the criterion of value for the novelist is not political morality but aesthetic value.

As we can see, the judge's interpretive approach may lead him to propose an interpretation based on a principle never explicitly recognized, as long as it nevertheless offers "a brilliantly unifying explanation of decisions taken, presenting them in a better light than ever before."³⁵ Interpretation, with its twofold dimension, that of fitness and that of political morality, is thus brought under a general reference norm: to make legal practice as good as possible, from the twofold viewpoint mentioned.

2. The twofold critique of the narrativist theory of law

From the foregoing we may derive the twofold characteristic that defines the Dworkinian model of narrative coherence from an epistemological point of

³² R. Dworkin uses the metaphor of Hercules to describe the "imaginary judge of superhuman intellectual power and patience who would accept the thesis of unity in law" (*op. cit.*, p. 55).

³³ *Ibid.*

³⁴ *Ibid.*, p. 64.

³⁵ *Ibid.*, p. 65.

view. This theory is bound up on the one hand with a questioning of the descriptivist nature of legal theory, and on the other with a cognitivist theory of values. It is with regard to this twofold characteristic that MacCormick's critique, and in part Aarnio's, develops.

a. The first characteristic, then, concerns the traditional descriptivist ideal of legal theory. Here the idea is twofold and is implied in the foregoing. Firstly, for Dworkin, legal theory and judicial practice are on the same level. Each is comprehensively interpretive of law as a whole. Here, as Dworkin implicitly says, there is an intrinsic link between legal science and judgement: "this is inevitable: if law is an interpretive concept, there can be no description of legal practice, however non-utilitarian, that is not already committed to one controversial interpretation."³⁶ Legal theory is comprehensive interpretation of legal practice. Especially in "hard cases", this is nothing but pursuit of this work of constant interpretation, though at a more specific level, on specific points of law. The second idea is linked with the first one. The idea of law as an interpretive concept in fact implies epistemologically identifying not only legal science with judgement, but also, *ipso facto*, theory of legal validity with theory of legal interpretation. Dworkin intends by this to refute legal positivism. According to him, positivism comes down to two theses. "The first argues that it is characteristic of a legal system that some more or less mechanical test provides necessary and sufficient conditions for the truth of propositions about what the law is, as distinct from the propositions about what the law should be."³⁷ The second is that the truth of legal propositions in no way implies any ontology other than an empiricist ontology.

Without here going into Dworkin's well-known theory about the "discretionary" power of the judge in "hard cases", we would recall that he considers that law cannot be reduced to the statement of rules, but also contains "principles". It is to these principles that judges unfailingly refer in solving "hard cases". These principles lead to a threefold consideration.

The first is that by contrast with positivists, Dworkin thinks that in hard cases, i.e. in disputes where mere appeal to rules is not enough to decide the case (antinomy, lacunae, disputed interpretation), the judge has in no way

³⁶ *Ibid.*, p. 52, note 1.

³⁷ R. Dworkin, "A Reply by R. Dworkin", in Marshall Cohen (ed.) *Ronald Dworkin and Contemporary Jurisprudence*, Totowa (New Jersey), Rowman and Allanheld, 1983, p. 247.

any real discretionary power, but must refer to principles contained in the law. These principles are constitutive of subjective rights in such a way that a decision of justice is always a recognition of a subjective right that a party may invoke.

The second is that judgements based on principle attest the inevitably moral character of legal judging: "Since different sets of principles will be consistent with legal history, the question of which of these provides the best justification of that history will be a matter of moral judgment."³⁸ This moral dimension of legal judging in no way implies, however, that this judging can be identified with judging aimed at defining the moral ideal. For Dworkin, in fact, two different questions have to be distinguished: on the one hand, that of the best political theory and the ideal legal system, and on the other, that of the best justification that can be supplied for the present legal history of our community. The judge "Hercules" is confronted only with the latter question.³⁹

The third consideration that the regarding of principles as an element of law leads to is the radically interpretive nature of the legal concept. The legal dimension of a principle becomes the effect of an interpretation of the symbolic value of conduct that constitutes legal history, and this interpretation, which has to be constantly redone, consists at a given moment of the best possible history that can be given of our political morality and our past practice.

It is along these lines of thought that the second characteristic of Dworkin's theory of narrative coherence takes shape. This thesis not only questions the descriptivist ideal of legal positivism but goes on to deny the moral scepticism it generally gives rise to. Vis-à-vis non-cognitivist ethics, Dworkin refuses both the naturalist model of moral intuitionism and the constructivist model dominated by relativism. His model, while of constructivist type, is based on the thesis that moral judgements can be objectively

³⁸ *Ibid.*, p. 254. Hence the difference between rules and principles: by contrast with what is the case for principles, "it cannot be said that a rule is sufficiently important within a system of rules in order for one rule, in the event of conflict between two of them, to carry the field because of its greater weight" (*La Chaîne du droit*, op. cit., pp. 39-40).

³⁹ On this see R. Dworkin, "A Reply by R. Dworkin", op. cit., p. 254. Hence also the difference that Dworkin seeks to articulate between legal judgement and political judgement, between legal rights and legislative rights, and likewise, his critique of utilitarian pragmatism.

true or false: "the claims of political morality may be true or false or, if one prefers, more or less accurate."⁴⁰

b. It is, then, in connection with this twofold characteristic that MacCormick's critique, and in part Aarnio's, develops. The hypothesis we shall seek to maintain is that this criticism seems hard to accept if one intends, as MacCormick or Aarnio seem to, to totally support the hermeneutic viewpoint as epistemological paradigm for the theory of law. Before setting out this criticism, two prior remarks are called for.

Firstly, it is interesting to note that the profound theoretical divergence between Dworkin and MacCormick over the theory of narrative coherence in law does not seem to have any effect on their analysis of the concrete approach that the judge takes to "hard cases." As Dworkin says in connection with his adversary's analyses, while denying the moral relativism and scepticism professed by the latter: "I do accept his account of what we might call the phenomenology of her judicial decision. Hercules can proceed in the way MacCormick describes, constructing general theories of law that he believes are the best that can be constructed."⁴¹ This observation is interesting. Does it not in fact authorize us to stress how little effect adoption of a cognitivist or non-cognitivist viewpoint as regards morals has? Is the divergence not more apparent than real, or more exactly, are its effects not neutralized by their more fundamental convergence? This is what we shall see below: the hermeneutic paradigm compels us to query scepticism, and reciprocally, reconsideration of the problem of truth would oblige us to query the hermeneutic paradigm again. Let us not get ahead of ourselves, however.

What we have to do now is qualify our position vis-à-vis Dworkin's. While we intend to show why for us Dworkin's position is preferable to MacCormick's or Aarnio's in the debate between them, a twofold reservation is called for. On the one hand, the condition is that what we have called the hermeneutic solution to the interpretive turn imposed mainly by ordinary-language philosophy on empiricist positivism in the social sciences be endorsed, as these authors do. We shall, on the contrary, seek to show how this hermeneutic solution, whatever be the validity of its criticisms of empiricist positivism, has to be modalized because of the theory of language it presupposes. On the other hand, our support for Dworkin relates only to

⁴⁰ *Ibid.*, p. 278.

⁴¹ *Ibid.*, p. 279.

the twofold characteristic mentioned of his theory of narrative coherence. As we indicated in the introduction, we do not in any way intend here to take a stance on all the other aspects of the theory, such as the one relating to the distinction between legal judgement and political judgement.

MacCormick's critique is developed essentially in an article entitled "Dworkin as Pre-Benthamite".⁴² The criticism, as we have already said, is twofold, relating both to Dworkin's questioning of the descriptive nature of legal science and to moral cognitivism. Dworkin, the author notes, develops a pre-Benthamite programme inseparably linking the descriptive and the evaluative aspect of legal theory, thus rejecting the positivist perspective developed since Bentham of the separation of "expository and censorial jurisprudence, legal facts and legal values."⁴³ Dworkin's programme has not been realized. To be sure, says MacCormick, legal reasoning implies recourse not only to rules but also to principles, and hence to values. "It would be only a matter of arbitrary fiat answering no good end of understanding if these elements of principle of policy were ruled out in an exposition or description of the law which exists within some jurisdiction. What that says, however, is only that a good description (or definition) of law must be expanded beyond a mere account of 'rules'. It does not say or mean that description as distinct from criticism of law is impossible. No doubt the legal system of the Soviet Union or of the Republic of South Africa is pregnant with principle as well as with rules, and should be seen and grasped as such. The principles, however, may be from my point of view very bad ones; I might rightly wish to proceed from description to criticism - and the mere observation that law comprises principles and policies as well as rules in no way impedes that proceeding, nor justifies the thesis that expository and censorial jurisprudence are, after all, identical."⁴⁴

MacCormick's second criticism is linked with the foregoing one. It relates to Dworkin's theory of the "right answer", i.e. ultimately to his moral cognitivism. In fact, he says, Dworkin's constructivist model ends up being a masked naturalist model, and is thus based on a moral intuitionism that generates jusnaturalism. This position must, when it comes to applying it

⁴² N. MacCormick, "Dworkin as Pre-Benthamite", in *R. Dworkin and Contemporary Jurisprudence*, *op. cit.*, p. 182 ff.

⁴³ *Ibid.*, p. 183.

⁴⁴ *Ibid.*, p. 191.

to the judge, be denied. Certainly, in hard cases, judges have to make those principles they feel to have most weight for the case in point prevail. It nevertheless remains that "this is not a matter that can be decided in a theory-independent way, nor can the question which is really best among the theories, which people think best, be answered in a theory-independent way. If 'constructivism' is correct Hercules can finish his job only at the far end of an infinite regress."⁴⁵ Relativism or scepticism would be essential because there would not, as Dworkin says in summarizing the argument, be any Archimedean point.

Aarnio's criticism seems in some way more restricted, since it seems to relate only to the second point. On the first question, Aarnio seems to take note of the irreducibly interpretive nature of legal science, and consequently to link theory of validity and theory of interpretation, thereby questioning the empiricist point of view of the descriptivist ideal in legal science again. Law can be grasped only through interpretation, which has constantly to be redone. Aarnio says this clearly: "the main content of legal dogmatics, in any case, consists of interpretative standpoints, i.e. standpoints concerning the meaning contents of the law in "hard case"-type situations ... the goal of legal dogmatics is not in these cases to reach acceptance but rational acceptability."⁴⁶ In this connection he notes: "rational acceptability as a regulative principle for legal dogmatics has the same role as truth has in empirical sciences";⁴⁷ and again, in connection with this regulative principle: "an ideal and particular audience is a group in which a rational consensus can be achieved."⁴⁸ The mark of Habermas could not be clearer.

This Habermasian derivation makes the critique Aarnio addresses to Dworkin's theory of narrative coherence all the more unusual, since the latter presupposes that of the "one right answer". Aarnio's position is in two stages.

Firstly, he posits that denying the thesis of the "one right answer" also implies denying this doctrine even where it takes on a weak sense, i.e. where it means that if one accepts the existence of only one right answer to a legal

⁴⁵ *Ibid.*

⁴⁶ A. Aarnio, *op. cit.*, pp. 184-185.

⁴⁷ *Ibid.*, p. 227.

⁴⁸ *Ibid.*, p. 226.

problem, one nevertheless regards it as impossible to find this "right" answer. On such a conception, "the one right answer is an ideal that can never be reached but which forms the regulative goal of all legal interpretation."⁴⁹

Then, in the specific version given it by Dworkin, the thesis of the "one right answer" is denied by Aarnio, though, we feel, in a somewhat ambiguous fashion. "The best possible theory" - on this theory of Dworkin's see above - "is a postulated ideal which entitles us to say that a certain decision is the right one, as it corresponds to the ideal. At the same time, however, it is only a postulated ideal." In the same sense, Aarnio goes on to state that it is a philosophical postulate unjustifiably linked with the assertion of absolute values: "furthermore, our Western legal culture is not based on such absolute ideas."⁵⁰ This is ambiguous since it would seem that two distinct criticisms can be identified. On the one hand, Dworkin's theory would imply that the "one right answer" could be discovered: the right solution would be knowable. On the other hand, even were Aarnio's solution interpreted more flexibly, it would follow that the theory of the "best possible theory" would be criticizable even in a weak sense, i.e. where it would constitute merely an ideal.

This twofold criticism from MacCormick and Aarnio becomes justified if one at least notes that each intends to go to work in the light of the hermeneutic paradigm. The question posed here consists in seeing whether the hermeneutic theory of law may not find in Dworkin's theory of narrative coherence one of its most consistent expressions. This also amounts to asking whether the unease that MacCormick and Aarnio feel about Dworkin's moral cognitivism and the implicit reproach of dogmatism that they make to him, if it is to be taken seriously, ought not only to authorize critical querying at epistemological level of what we have called the hermeneutic solution of the post-empiricist interpretive turn, but ought also to be reflected in a phenomenology of legal decision that would neutralize the dogmatics effects thus bound up with this cognitivist presupposition. But let us once again not get ahead of ourselves, and content ourselves at this point with briefly examining the philosophical answers that justify the hermeneutic solution to the criticism made by MacCormick and Aarnio of Dworkin's theory of narrative coherence.

⁴⁹ *Ibid.*, p. 159.

⁵⁰ *Ibid.*, p. 165.

Let us first note one important aspect of the answer given by Dworkin himself to his two adversaries as regards their criticism of his "one right answer". Two remarks are called for here.

Firstly, should it not be stressed that, despite some no doubt occasionally hazardous formulations, Dworkin seems to conceive his theory of the "one right answer" not as an affirmation of the possible knowledge of moral truth, but in the weak sense given to it by Aarnio, i.e. as a regulative ideal that norms, and provides a horizon of meaning for, legal reasoning? The very way Dworkin presents his model judge, "Hercules", seems to justify this interpretation: this judge is himself described as "an imaginary judge of superhuman intellectual power and patience."⁵¹ Moreover, the analogy with the literary game of the novel written successively by several writers leads to the same Kantian interpretation of the "truth" of values (on this Kantian interpretation, see below).

Secondly, we shall merely cite the main argument brought against MacCormick by Dworkin. It is a simple resumption of the logical argument that is brought up to oppose the sceptical thesis. The sceptic cannot assert his own thesis without contradicting himself. As Dworkin says: "if MacCormick does not allow truth when reasonable people can disagree, and there is no canonical proof, why does he think there is a right answer to the question of moral 'objectivity'?"⁵²

On the criticism relating to Dworkin's querying of the descriptivist ideal, our answer will be brief. Not that the problem is easy; on the contrary it calls for profound development requiring special study. In the context of this article, however, a twofold consideration will suffice.

The first is merely a restatement of what we have already said, though augmented with a reference to Habermas. The very choice of the hermeneutic paradigm, we have already said, implies that the law is in no way identified with an empirical observable datum, but with symbols, i.e. with a meaning attached to conduct, in this case linguistic behaviour (rules, precedents, etc.). The symbolic dimension is even twofold, in some sense in the second de-

⁵¹ R. Dworkin, *Law's Empire*, London, Fontana Press, 1986, p. 239.

⁵² "A Reply by R. Dworkin", *op. cit.*, p. 280; in the same sense, he had previously noted (p. 279): "Of course there is not (an Archimedean point). A neutral point of view is the point of view of someone with no moral convictions, and nothing about morality could possibly be decided from such a point of view. But that includes the negative thesis of morality, that no moral claim is "really" right or accurate or sound or true, because that is also a moral claim, if it is a sensible claim at all."

gree, if "principles" are held to, rather than rules, for the reason then as a general rule there are no behavioural supports that are held explicitly to state them. Accordingly, it has to be admitted that the legal theoretician's attitude, like that of the judge embarking on defining what law is, is an attitude aimed not at saying how things are (the attitude proper to scientists) but at understanding what others beforehand have told them. Their attitude is interpretive. There is no objectivization of the datum imposed, but interpellation of the meaning of a piece of behaviour that calls for understanding.

This attitude of interpretation has three methodological consequences, as J. Habermas states. We shall mention here only the first, which concerns us more directly: "Firstly, interpreters renounce the superiority that devolves upon the privileged position of the observer, since they are personally involved (at least virtually) in the debates concerning the meaning and validity of statements. In taking part in communicative acts, they in principle accept a status identical to that of the people whose statements they seek to understand."⁵³ Hence, also the fact that determination of meaning - and hence, extrapolating to the whole set of linguistic behaviour that serves as a support for normative sources, determination of the law - is an operation that is never closed. It has to be launched anew each time. Intercomprehension implies virtual reworking of the criticism and relaunching of a meaning that nothing can manage to exhaust. It is here that the properly linguistic dimension of law appears. Here, too, we glimpse the consequences of Habermas's analysis of formal pragmatism for that of the operation of judging. Although Dworkin has neither constructed nor identified these consequences, has he not partly intuited them? From this viewpoint, Dworkin's image of the chain novel and his term "chain of law" are extremely expressive. This may not however mean that the process cannot be stopped at some point of the chain, which brings us to our second consideration.

Questioning the descriptivist ideal does not imply giving oneself up to axiological subjectivism. If we follow Habermas on this point - as Aarnio does in our area - the interpretive process remains shot through by a rationality, the definition of which, in the rules that are constitutive for it, is contributed to by the presuppositions, or more exactly the possibility conditions, of the intersubjective and communicational framework within which the interpretive operation takes place. It is from the same perspective that Habermas seeks to rethink the question of hermeneutic objectivity in the "social" sciences.

⁵³ J. Habermas, *op. cit.*, p. 47.

It is at the same level that the answer to the sceptical critique put forward by both MacCormick and Aarnio is to be found. One last remark is called for before going on with this second argument. MacCormick is right to stress that his "description" of the Soviet legal system should be distinguished from any critical assessments he might make of it.⁵⁴ The questioning that preceded this descriptive operation does not imply that we automatically identify the interpretive point of view of legal theory with any assessment whatever. The "legal judgement" that reflects the hermeneutic model of legal theory and the judge's decision is based on interpretive constraints, on a model of rationality that distinguishes it - to an extent that we cannot seek to define here - from political judgement (assessment). The distinction does not however blend together the distinction between description on the one hand and assessment on the other.

In some respects, this is the same type of theoretical argumentation as used by Habermas to restore the explanatory value of the hermeneutic sciences. He uses this to counter the non-cognitivist theory of values. Here too, the approach is regressive. The intersubjective dimension marking the linguistic experience in which the normative discourse is constructed bears within it, in virtue of the possibility conditions it presupposes, the answer to the validity conditions of that discourse. We can thus see how the Habermasian argument leads to logically linking what we have called the solution of the hermeneutic paradigm and cognitivist ethics.

We shall neither develop nor discuss Habermas's reasoning here. We shall content ourselves with giving its logical structure, in order to show how it seems to lead to what Aarnio would call the theory of the "one right answer" in a weak sense.

Habermas's argument is not unconnected with the answer that Dworkin gives to MacCormick's sceptical argument. Habermas takes up this traditional answer in order to found it, no longer on a monological position, but instead on the performative structure of the communicational act relating to norms. The contradiction of the sceptical position becomes a performative contradiction.

⁵⁴ "Dworkin as Pre-Benthamite", *op. cit.*, p. 191.

Habermas's argument is in three stages.⁵⁵ The first stage is itself divided into two steps. Firstly, pursuing the trail blazed by Strawson's linguistic phenomenology, Habermas seeks to show that a purely empiricist ethics leads to neutralizing the validity claim that accompanies the linguistic behaviour relating to norms: "To say that one must do something amounts to saying that there are good reasons for doing it."⁵⁶ It will be noted that this is a consideration that is more than somewhat reminiscent of the one Hart uses to denounce imperativist theory, American realism and Scandinavian realism in law.

On this basis, Habermas states that when it comes to explaining the meaning of this validity claim, the sceptical position that emotivist, imperativist or descriptivist ethical conceptions come down to rests on meta-ethical affirmations that are not without counter-arguments. Let us look at what Habermas himself says: "The non-cognitivist viewpoint is based essentially on two arguments: a) the empirical indication that it is normally impossible to smooth out differences aroused by questions of principle and morals; b) the failure we have already mentioned of the attempt to explain the truth requirement for normative propositions either in the sense that intuitionism understands it ... or in that in which classical natural law or the material ethics of values (Scheler, Hartmann) do. The first objection might be invalidated by designating a principle that would be able in principle to produce mutual agreement in moral argumentation. As for the second objection, it vanishes as soon as one abandons the axiom according to which any normative statement presenting merely a validity requirement cannot be called valid - or invalid - except in the sense of propositional truth."⁵⁷ It must therefore be posited that the validity of the normative proposition is not truth - they are in fact neither verifiable nor falsifiable - but rightness (Dworkin too speaks of *accurate norms*): "we must therefore start from the assumption that the validity requirement is analogous to the truth requirement."⁵⁸ We now pass to the second stage of the argument.

⁵⁵ J. Habermas presents the complete form of this argument in "Notes programmatiques pour fonder en raison une Ethique de la discussion" in *Morale et Communication*, *op. cit.*, pp. 63-130.

⁵⁶ *Ibid.*, p. 69.

⁵⁷ *Ibid.*, p. 77.

⁵⁸ *Ibid.*, p. 78.

In the second stage, Habermas seeks to underpin this hypothesis by validating the existence of a principle that allows mutual understanding to be assured.

Here too the reasoning is in two steps. On the one hand, he shows that the validity requirement that accompanies norms - normative rightness - by comparison with the one that accompanies assertions - truth - justifies finding an answer to this validity requirement in the logical structure of moral argumentation. The reason is that by contrast with relationships between the existence of states of affairs and the expectation that the affirmative propositions corresponding to them can be justified,⁵⁹ there exists, on the contrary, a close relationship "between the 'existence' of norms of action on the one hand and the anticipated possibility of justifying the prescriptive propositions that correspond to these norms on the other."⁶⁰ Hence the idea of directly linking the question of the validity conditions of moral judgements to a logic of practical discussion; which brings us to the second step.

The logical principle underlying the argument is the principle of universalization (U). It alone ensures mutual understanding in practical discussions, and is thus a bridging principle playing a "role equivalent to that of the principle of induction in the discourse of empirical science."⁶¹ This principle of universalization, clearly not unconnected with Kant's categorical imperative, is given by Habermas a scope that makes it dependent on the actual carrying out of an argument and not on the mere monological play of thought.⁶² What remains is to give this bridging principle a foundation in law. This is the object of the third stage of the argument.

The third stage consists in a "quasi-transcendental" modalization of Apel's transcendental pragmatism. We shall not here go into the shades of difference, however important they may be, between Apel and Habermas - who rejects Apel's transcendentalism in order to maintain the historical, and therefore random or precarious, brand that the patrimony represented by our argumentational rationality bears. We shall merely go over the substance of

⁵⁹ In fact there exists no "internal relationship between the existence of states of things and the expectation manifested by a particular group of people that 'the assertorial propositions corresponding to them be justified'" (*ibid.*, p. 183).

⁶⁰ *Ibid.*, p. 83.

⁶¹ *Ibid.*, p. 84.

⁶² On this see *ibid.*, pp. 88-89.

the foundation in reason of the U principle. The argument is drawn from the presuppositions of the performative use of language denoted by communicational argument. There would be a performative contradiction in denying the U principle, since it is presupposed as a possibility condition of the performative act implied by moral argumentation and by the validity claim it makes: "The foundation in reason that is required of the moral principle proposed might, then, take a form such that all argumentation, whatever be the context in which it is produced, would rest on pragmatic presuppositions with a propositional content form which the principle of universalization, U, might be deduced."⁶³

Clearly, this foundation in reason, whether it be transcendental or quasi-transcendental, leads to the non-dogmatic assertion of the "truth", or more exactly "rightness", of practical questions. This rightness is no more than a horizon of meaning, always looked towards but never reached. It is an Idea in the Kantian sense, a principle of thought in the sense Kant gives that term in his third critique. Hence the link with Aarnio's expression: "one right answer in a weak sense".

The foregoing developments had the aim of showing that, as soon as one embarks on what we have called "the hermeneutic solution of the interpretive turn" made over the last few years in legal theory, Dworkin's theory of narrative coherence seems to express positions that are epistemologically consistent with the paradigm used.

As we suggested earlier, the criticism put forward by MacCormick and Aarnio seem to us hard to reconcile with the paradigm they themselves intend to bring to bear. Perhaps, however, this paradigm can be queried without *ipso facto* questioning the interpretive turn recently taken by legal theory. The rejection of dogmatism on the authority of which MacCormick's and Aarnio's criticisms seem to act might then be reformulated and be expressed through other theoretical arguments. This brings us to our second hypothesis, the one relating to the limits of the narrativist model, and hence of the hermeneutic paradigm, having regard to the theory of language that seems to be bound up with them.

⁶³ *Ibid.*, p. 103.

SECTION 2: NARRATIVITY AND PHILOSOPHY OF LANGUAGE:
THE LIMITS OF THE HERMENEUTIC PARADIGM

In a first stage (§ 1), we shall sketch out the theory of language that is correlative with the hermeneutic paradigm. We shall then posit the hypothesis of an alternative model of language, which we shall call that of the "logic of enunciation" (§ 2).⁶⁴

§1. Hermeneutic model and theory of language

To define this model of language, we shall take as our reference point Gadamer's theory. What justifies this privileged reference? Is it not arbitrary to claim to query the theory of language underlying narrativist theory, and more generally the hermeneutic paradigm, on the basis of Gadamer's analyses alone? Moreover, is it not paradoxical to take Gadamer as a privileged reference, when we know, as we indicated in our introduction, that we claim to rank Habermas's philosophy under the hermeneutic paradigm - understood in a broad sense - and when one knows the differences that there are between these two authors? Nevertheless, the chain that leads from narrativist theory to Gadamer's is easy to understand. Since we have set it forth at length elsewhere,⁶⁵ we shall here develop only the second stage and content ourselves with merely citing the first one.

The narrativist hypothesis is at present given two philosophical readings, those of Ricœur and of Arendt. This twofold narrativist viewpoint (and it would seem to us that Dworkin is closer to Ricœur's one) in turn has a counterpart in the two models of political philosophy that come out of Kant's third critique, Habermas's one and Arendt's one. But as Habermas himself very clearly saw, the debate in political philosophy that polarizes the contemporary field of thought, setting Arendt against Habermas, is bringing out a more fundamental debate, the epistemological debate that sets Gadamer's hermeneutic model against Habermas's and Apel's model of criti-

⁶⁴ We would point out that the following remarks will deliberately be kept brief. They are developed and argued in more detail in a forthcoming book, A. Berten and J. Lenoble, *op. cit.*, t.I, *Les paradigmes en présence*, to be published in 1988.

⁶⁵ See our article, already cited, "Philosophie contemporaine du droit et modèle herméneutique".

cal self-reflection. We shall not go over this point again here.⁶⁶ The end-point is the second connection required to reconstruct the chain leading from narrativist theory to Gadamer's: how to put forward the common structure of thought underlying the two positions, Gadamer's and Habermas's? From one viewpoint, indeed, this hypothesis is paradoxical. The difference between Habermas's and Gadamer's positions is well known.

Habermas's model of successive approximation through critical self-reflection to the ideal of transparent communication is opposed by Gadamer's hermeneutic model. For the latter, there can be no extra-linguistic critical understanding. The modern position of a reflexive approach that would allow a critical return of Reason upon the historical presuppositions of its own approach is posited as a misunderstanding of one's own prejudices. For Gadamer, there is no trans-historical or prejudice-free reference: in this sense, there is no meta-language.

This evidently explains why for Gadamer, by contrast with the *Aufklärung*, "tradition constitutes in itself not only the vehicle but also, to a certain extent ... the guarantee of truth, while, for a radical *Aufklärer*, a truth handed down by tradition must be capable of justification by critical reason independently of this fact."⁶⁷

Conversely, it is easy to perceive the criticism that Habermas brings against Gadamer's hermeneutic position. This kind of reference to tradition would misunderstand the difference between fact and law as a condition of the very meaning of our practice. The very concept of communicational reason is aimed at precisely this possibility of thought returning upon itself, upon the conditions of its own decisional production. However, the difference between hermeneutics and self-reflection, between understanding and modernity, calls for qualification.

The point of convergence between the hermeneutic schema and the self-reflection schema may be found in the fact that each ultimately constitutes a conception of the ideal in terms of which, though from different angles, there is posited the assertion of a significant articulation that progressively

⁶⁶ An irreducible history of viewpoints, an inescapable immersion in a field of language that acts as a framework for common-sense judgement: these are the two features that, for Arendt, explain how a judgement in a case cannot be linked with a theoretical model. Here one may recognize the pregnancy of Gadamer's thinking about the logic at work in any understanding approach to meaning.

⁶⁷ J. Bouveresse, "Herméneutique et linguistique", in *Meaning and Understanding*, edited by M. Parret and J. Bouveresse, W. De Gruyter, Berlin-New York, 1981, p. 117.

extends reality by increasingly symbolizing it. To be sure, each of these thoughts takes note of the radical finiteness of the subject that produces meaning. This is, moreover, the explanation for the fact that the political theories rooted in one model or the other each have recourse to Kant's aesthetic solution, elaborated by him in the *Critique of Judgement*. All dogmatic thought is eradicated from the area of social normativity, in favour of the pure production of meaning. There remains the fact that the horizon of meaning set at the origin of all historical understanding is posited as a reference that acts within the historical process of meaning. If the ideal is forever unattainable - and in this sense the process of understanding has always to be engaged anew - this same ideal vectorizes the manifold and unifies the symbolic self-realization of reality.

The schema is evident for Habermas. Self-reflection allows access to the universe of meaning, through a free and rational linguistic expression, which obliterates the elaboration of the latter and the production of meaning that ought to result from it. This logic of the ideal as acting is all the more revelatory for being thought of by Habermas as intrinsically commanded by the very conditions of the functioning of language. Giving an account of what speaking is would allow language to be unveiled as what unfailingly guides the self-deployment of reality in the deployment of its meaning. Language, by itself, induces what is different to dissolve itself in the universality of truth. Language is thought of as a necessary principle of the self-accomplishment of the meaning of reality.

But it is yet more interesting to note that this same theoretical logic - though in different ways - underlies the hermeneutic interpretation of the understanding of meaning.

No doubt here the critique of the *Aufklärung* schema intends to assert a still more radical finitude than that which underlies Habermas's theory. This finitude would not merely be such as to condemn the significant interpretation of reality to constitute itself only as the effect of a reflective judgement. It would go as far as questioning the very link that Habermas intends to maintain between legitimate action and the truth of reason (dedogmatized). This radical finitude, we have seen, is expressed in Gadamer through the thesis of the impossibility of a meta-language. It is nevertheless important to note that, in parallel, Gadamer thinks of language and its effects on the human subject irreducibly caught up by it in such a way that there is reconstituted in it a logic of meaning, which, in a certain relationship at the very least, resembles the model of the ideal that underlies the Habermasian schema. The way of giving an account of the work of symbolization of reality reflects a way of conceiving the relationship between reality and language that at this level joins up with that of the theory of critical self-reflection. In

support of this, two observations, drawn from Gadamer's remarkable analysis of language, can, we think, be made. They have to do with, respectively, the theory of the relationships between being and language and the theory of the beautiful that Gadamer applies in order to give an account of the operation of meaning in language.⁶⁸

a) The first observation is intended to take note of the relationship of identity that Gadamer posits between Being and language. We know how this term was already to be found in Heidegger's thought. What is important to see here is the twofold idea conveyed by the way in which Gadamer conceives the relationships he weaves between Being and language. This twofold idea is manifested very exactly in the specific field of the theory of language, simultaneously with the aforementioned logic of the ideal - i.e. the reference to unity as the ideal motor that operates on the principle of discursive multiplicity - and the theory of the irreducible finitude of the human subject. In fact, at the same time, Gadamer does not cease to note the substantial link that there is between Being and language: Being is language in the sense that what happens to language is Being itself insofar as it is known and understood. But at the same time, the historicity of understanding attests the infinite, ever-creative process of this coming into language of Being, an infinite process that marks the partial, in both senses, character of any linguistic comprehension, and in which the speculative dimension of language is expressed. Here we find again, in another form, Kant's theory of reflective judgement: meaning is perceived as the symbolic trace of the horizon of meaning. Let us clarify the former idea a little.

A recurrent topic in Gadamer's theory of language is the demonstration that language, in its very movement, is the movement of things. Not only does it mark the fact that "the relationship of man to world is through and through and fundamentally language, and therefore understanding",⁶⁹ still more, it is a fundamental ontological structure that is being expressed there: the linguistic experience of the speaking subject is the expression of the ac-

⁶⁸ As already stated, we shall do no more here than summarize observations made elsewhere; we would therefore ask indulgence for the sometimes over-brief nature of our presentation of Gadamer's position.

⁶⁹ H.G. Gadamer, *op. cit.*, p. 331; this further allows Gadamer to note that "in this sense hermeneutics is ... a universal aspect of philosophy, and not merely the methodological basis for what is known as the human sciences".

tion of the thing itself. This idea of the identity between Being and language still has to be explicated in another way.

Language is not, according to Gadamer, conceived except as inscribed within a reference to the idea of totality. At least two traces of this reference can be found. Firstly, language is universal, "in the sense that in it *anything* can happen to speech."⁷⁰ Secondly, the idea of totality that is at the origin of language aims less at the extension of the identity between Being and language than at meaning adequation itself. We here come to the idea, central in Gadamer, of the need to refer linguistic experience to the problematic of the One and the many as conceived of in Platonic dialectic and medieval thought on the mystery of the Trinity.⁷¹ The idea of totality in this second sense appears at the very origin of linguistic experience of the world as at work upon the infinite diversification of that experience; but it can also be found at the very end of this infinite diversification process, as what is aimed at by meaning. The linguistic approach is comprehensive, inscribed within the aim of a totality of meaning; the very totality that does not stop being expressed in a partiality that attests our finitude.

This return to Greek and medieval thought made by Gadamer in order to perceive the nature of language allows us to understand his approach to the Being-language identity still better. Gadamer does not cease to show that the modern theory of language, instituted by Wilhelm von Humboldt, loses just this link between Being and language. The modern theory of the sign, Gadamer notes, fails to recognize that "the word belongs so intimately to the thing itself that it is not assigned to it *ex post*, by way of sign"⁷² ..To present this intimate relation between Being and language, this relation that makes language caught up in a movement, in which the thing moves the speech that is the understanding of its meaning, Gadamer cites a phrase from St. Thomas: "The word is like a mirror in which we see the thing".⁷³ This expression clearly does not have in mind the naive theory of the word

⁷⁰ *Ibid.*, p. 317; our emphasis.

⁷¹ *Ibid.*, p. 311: "In discovering that the word in language is at the same time one and manifold, Plato does no more than take a first step. It is always a word that we say to each other and that is said to us (from the theological viewpoint, "the word of God"), but the unity of this word breaks down ... as articulated discourse progresses."

⁷² *Ibid.*, p. 267.

⁷³ *Ibid.*, p. 276.

conceived of as a copy of nature (from this viewpoint, Gadamer endorses Socrates's refutation of that naturalist theory, developed in Plato's *Cratylus*). Its scope is wider: it intends to say that language expresses the truth of Being in the sense that Being comes about through language. The theory of the identity of the meaning of Being through language is clearly expressed by it.

b) Identity of Being and language was the first characteristic of Gadamer's vision of language, further illuminated by the two statements that, on the one hand, "in language anything can happen to speech" and, on the other, "the word is like a mirror in which we see the thing". This identity was, however, as we have seen, modalized by the consideration that the aim of totality of meaning that underlay the self-deployment of the meaning of Being in language was an unending process. The second characteristic, while it partly limits the identity stated, has to be properly understood. The reference Gadamer makes to the Platonic theory of beauty comes to our assistance here. This allows it to be seen that this infinity of the process of self-deployment, while it marks the impossibility of grasping all the meanings in which Being is expressed, nevertheless, in apparently ambiguous fashion, does not prevent each meaning from being a fully adequate grasping of Being. Every partial grasping of meaning is in itself unitary and total. Gadamer's idea here is that, paradoxically, while each production of meaning marks the inscription in language of "a hiatus between the visible and the ideal", it is here too that "it is at the same time filled in"⁷⁴ Language is thus perceived as simultaneously the mark of a gap, a separation, between reality and its meaning, but at the same time, of a gap that is filled through the very act of statement. To express this, Gadamer refers to the Platonic theory of the Beautiful.

The Beautiful "possesses its own clarity, so that it does not happen that we fall victim to disfigured copies". For "only to beauty has it been given to share being the most striking and at the same time the most simple thing" (*Phaedrus*, 250, d, 7). "This anagogic function of the Beautiful ... reveals as present a feature of the ontological structure of the Beautiful, and consequently, a universal structure of Being itself ... The idea of the Beautiful is truly present in that which is beautiful, undivided and wholly."⁷⁵ Thus, "the

⁷⁴ *Ibid.*, p. 337.

⁷⁵ *Ibid.*

beauty of the beautiful appears a light, as a lustre inseparable from the thing".⁷⁶ In this way the intelligible is made "visible": "the light that causes all things to arise so as to make them clear and intelligible in themselves is the light of the word".⁷⁷ It is through this that the link is attested that Gadamer notes between the metaphysics of the Beautiful and of light, and of the hermeneutic experience: "initially, the appearance of the Beautiful and the mode of being of understanding has the nature of an event (Ereignis); later, the hermeneutic experience as experience of meaning handed down in tradition, shares in the immediacy of all the evidence of truth".⁷⁸ The first idea is bound up with the priority that Gadamer assigns to "the action of the thing within the hermeneutic experience". The second is linked with the finding that, just as it is the metaphysical characteristic of the Beautiful to suppress the hiatus between idea and appearance, so the experience of understanding that is the language game acts in the same way: "to be sure, all understanding implies that what is expressed takes on its determination in favour of an occasional enrichment of its meaning. But this determination by situation and context that enriches discourse to the point of making it equal *the totality of meaning* and which allows what is said to be said proceeds not from the person speaking but from the thing being enounced."⁷⁹

§ 2 *From hermeneutics to the logic of enunciation*

Let us first of all clarify what has been established in the foregoing paragraph. The hermeneutic model - understood in the broad sense, as we have stated - is based on a common structure bound up with a theory of language. In Habermas's perspective, and still more radically in Gadamer's, the finitude of the speaking subject is located in the fact that the meaning of language never exhausts the ultimate meaning of reality. In this sense, the production of meaning remains irreducibly inscribed in a horizon of meaning that never ceases to be unexhausted. Meaning can be uttered, but never exhausts the model of its meaningful completeness. Here there is a logic of the ideal at

⁷⁶ *Ibid.*, p. 338.

⁷⁷ *Ibid.*, p. 339.

⁷⁸ *Ibid.*, pp. 340-341.

⁷⁹ *Ibid.*, p. 345; our emphasis.

work. It matters little at this stage, as we have seen, to note that the ideal is not identical for Habermas and for Gadamer. For the former, the ideal remains that of a critical reason on the basis of which the production of historical meaning can be evaluated. For the latter, the ideal does not have this normative scope. The point here is not to evaluate a historical meaning in the light of a meaning that is aimed at, the one defined by the Reason at work in the ideal model of debate, but to ensure the continuous production of statements of meaning with an eye to the self-deployment of the meanings of Being, although for ever unattainable. In each model, the meaning of reality is uttered in a language in which the subject nevertheless discovers his irreducible inability to utter it in its entirety. His impotence in language is the very mark of his finitude. This opens up on an inevitable repetition of meaning, aiming at a horizon - an endless road.

The hypothesis we wish to posit here is that prior to the finite subject's being caught up in the order of meaning that hermeneutics admirably locates, this fact of being caught up is itself predetermined by a logic which is identically that of the expression (utterance) in which the order of meaning is uttered. This taking into account of an *a priori* that is traditionally not located compels a reconsideration, a shifting, of the presuppositions of hermeneutics. In other words, the idea is here that if analysis of language is carried to a more radical level, namely the very level of the possibility conditions presupposed by the very fact of speaking, a "transcendental" aspect is revealed in language that "founds" the very operation of meaning. It is this transcendental aspect that is called the logic of enunciation. Let us note at the outset that the term language is rather inadequate, since what is meant is spoken language, i.e., more specifically, discourse.

The elaboration of what is always presupposed by the very fact of speaking finds points of support in the contemporary developments of philosophy of language, both those of logical analysis of language and those of linguistics and pragmatic theory. What seems to emerge is that language - or rather discourse - functions less on the basis of a logic of the ideal, and thus of the hermeneutic schema of the Being-language identity, than on the basis of a repetition of utterances in which the rupture between reality and language never ceases to be marked. Language reflects less the process of impotence to the extent that it operates through the constitutive effect of that which is impossible to utter. Accordingly, beyond a logic of meaning - of the meant - there lies at a more "foundational" level, a logic of the chain of discourse as such. This logic is a logic of the impossible. What is meant by this last ex-

pression? We shall give only two characterizations of it here, and only the second will be explicated a little, on the basis of Frege's work.⁸⁰

This expression of the impossible means firstly the idea that the functioning of ordinary language rests upon a self-referentiality that is constitutive of an ineliminable paradox. The idea of the self-referentiality of ordinary language has been well brought out by pragmatic theory; it is bound up with the theory of generalized performativity.⁸¹ If in this perspective we follow Fr. Recanati in particular, the paradoxes generated by this self-referentiality can be brought out only through Russell's theory of types, given the "self-citation" of ordinary language, to use an expression of Derrida's. The solution classically supplied can be found in Wittgenstein's distinction between telling and showing. Undoubtedly, one may say, what constitutes the speech-act cannot be told without risking falling into a paradox of the type of the celebrated paradox of the liar (also known as the Epimenides paradox). But that which cannot be spoken can be shown: what I do when I speak is exhibited in the very form that enunciation takes. It is only where there is a contradiction between this form and the content of a statement that there will be a pragmatic paradox, such as the statement: "I am not speaking". The argument is not subject to criticism from a consideration that what is done in speaking is actually to make statements in particular modalities of utterance (promise, statement, request, etc.). The fact remains that there is a more central "doing", which is the emergence of meaning, what J. Ladrière calls the "meaning power of language" - that central question of any philosophy of language.

It is at this last level that we come to the paradox that cannot be eliminated through the formal structure that utterance takes, which justifies our speaking of a "logic of enunciation" that is constitutive of the order of discourse. In this sense, the famous "I am lying" paradox is paradigmatic for any statement, insofar as there is a radical disassociation between the order of the world and the order of language. If we define the subject as that which actuates enunciation, as intention to speak reality, as the conjunction - even ideal - of meaning and the expression (of *signatum* and *signans*), of language and the world, this subject is not a mere horizon of meaning, but an impossibility. We have sought to show elsewhere how structural linguistics, pragmatics in its two aspects of utterance and the statement, and the theory

⁸⁰ For further developments, see our work cited above.

⁸¹ On which see particularly, in French, the remarkable work of Fr. Recanati.

of proper names supply elements in support of this hypothesis. This is not the place to repeat that. Here we wish merely to seek support in Frege's theory of cardinal number,⁸² as recently reinterpreted by an epistemologist, J.A. Miller. Let us note that the latter, in his reinterpretation of Frege that we partly adopt here, speaks instead of "logic of the signifier"⁸³ (logic of the "*signans*"). For various reasons, developed elsewhere, not the least of which is that the term risks not taking sufficient account of the acquisitions of pragmatic philosophy in respect of structural linguistics, we prefer the term logic of utterance, or more precisely, logic of enunciation.

Frege's thought, which clearly relates not to ordinary language⁸⁴ but to the symbolic functioning of the language of mathematics, indicates that the symbolic game is based on the purely formal mechanism not of an internal negation (the imperfect search for an always partial meaning) as in hermeneutics, but of a preclusive negation. This, then, will be the last point of our discussion.

What is the scope we attribute to Frege's theory of number? The idea is here that this theory, aimed at defining cardinal number⁸⁵ - i.e. the number "one" along with the relation of successor which generates the sequence of the integers - discloses, as it were by itself, the law of discourse. Though this approach to number, as J.A. Miller so rightly points out, the law of

⁸² Frege, *Grundlagen der Arithmetik*, (1884), French translation by C. Imbert in 1969, under the title *Les fondements de l'arithmétique - recherche logico-mathématique sur le concept de nombre*, Paris, Seuil.

⁸³ J.A. Miller, "La suture-élément de la logique du signifiant", in *Cahiers pour l'analyse*, (travaux du cercle d'épistémologie de l'Ecole normale supérieure), Paris, Seuil, vol. 1, 1966, p. 37 ff.

⁸⁴ The support we draw from this thought of the famous logician is therefore analogical; on this see our work cited earlier.

⁸⁵ Frege is traditionally presented both "as the starting-point of the entire modern analytical movement", in Michael Dummett's phrase, and as the person who "if anyone ever did, created what is called modern logic". The search for the logical construction of number is a response to Frege's logicist project of basing arithmetic only on laws of pure thought, i.e. only on principles derived from logical progressions. In his endeavour to reduce the very terms of arithmetic to primitive logical terms alone, he noted the need to posit a definition of the notion of number corresponding to this need. In order thus to adopt a purely analytic approach to the concept of number, Frege posited that it was necessary in the first stage to define cardinal number, and only subsequently to define the notion of succession.

operation of language is expressed, at least as long as that language respects the demand for truth. Hence the term logic of the signifier, or as we say of utterance - logic of enunciation - to mean what in this theory is disclosed as it were in the margin: "logic", as showing the formal operation proper to all fields of knowledge; "utterance" - enunciation- defining, on the basis of what is presupposed by the logic called logician's logic by J.A. Miller to differentiate it from the type identified here, the relationship between the subject and discourse in general.

The logical approach to cardinal number thus allows us to locate the exterior where the logic of discourse originates, "through a movement of retroaction starting specifically from the field of logic" It will show that the order of language constrained by truth cannot operate save by positing at its origin an exteriority that it nevertheless cannot help but misapprehend: as pointed out again by J.A. Miller, this original dimension of logic, this "archaeological dimension", at the very instant that it is disclosed as the principle of discourse is automatically repressed. This failure of recognition which denominates the relationship of the subject to the chain of his discourse, is called by Miller "suture".

What is important for us, then, is to properly perceive the operation of interpreting Frege as it is accomplished here: what is posited is that, through the definition of number, simultaneously both the operation on the basis of which the process of language constrained by truth can function - which we call logic of enunciation - and the deception that ineluctably accompanies this symbolic process itself, since this initial operation is presupposed by symbolizing as such, are misapprehended in the representation that the subject of discourse gives of the discourse. To use Miller's own expression, in this second aspect "the failure of recognition starts from the production of meaning".⁸⁶

It is now important to see more exactly what the raw material of Frege's logical analysis discloses. Frege's analysis of number and of successorial progression is carried out in such a way that the order of number discloses how things are with the order of discourse. Indeed, the law of the purely logical construction of number brings out two things.

The first lesson is that "one" presupposes, in its purely logical construction, the number zero, which in turn presupposes as its basis an impossible

⁸⁶ J.A. Miller, "La suture-élément de la logique du signifiant", *loc. cit.*, p. 39.

object, defined as the object that is not identical to itself.⁸⁷ From this it emerges that the logical discourse presupposes as its foundation an impossible object, which it cannot help simultaneously invoking and at the same time “repressing” in order to inscribe it in the chain in the form of a representative, a mere *locum tenens*, which is to be paradoxically posited as being the object not identical to itself. This is because zero, which refers to the impossible, contradictory object, will be counted as “one” in the order of number. This is what allows J.A. Miller to note the following. “The impossible object that the discourse of logic invokes as that which is non-identical to itself and rejects as the pure negative, which it invokes and rejects in order to constitute itself as what it is, which it invokes and rejects as wanting to have nothing to do with, we shall call, insofar as it functions like the excess acting along the sequence of numbers, the ‘subject’.”⁸⁸ The unfolding of the operation of Frege’s logical construction of the number “one” thus brings out the three constitutive elements essential to it: the necessary invocation of the impossible object - called the zero of absence by Miller - then the number zero that assigns the concept of this object, and the number “one” assigned to the concept of zero as number. Hence the element of principle, that zero, subsuming the impossible object, is counted as one. This is the operation that is constitutive of the order of discourse where the paradoxical, differential structure of the enunciation appears, if it is realized that

⁸⁷ Frege defines zero as follows: “Since nothing falls under the concept ‘non-identical to itself’, I posit by definition that zero is the cardinal number belonging to the concept ‘non-identical to itself’ ... I use the word ‘concept’ such that ‘*a* falls under the concept F’ is the general form of a content of judgement relating to an object *a* and remains a content of judgement whatever one may substitute for *a*. In this sense, ‘*a* falls under the concept non-identical to itself’ means the same thing as ‘*a* is not identical to itself’ or ‘*a* is not identical to *a*’. To define zero, I could have taken any concept whatever under which there falls nothing. But it was appropriate to choose a concept such that this particularity could be shown by purely logical means; for which the concept ‘non-identical to itself’ seems the most favourable...” (*op.cit.*, § 74).

“One” is constructed on the basis of the number zero, for which it suffices to construct the concept. By taking zero no longer as number of the concept non-identical to itself, but as itself the object of a concept, it follows that the number assigned to this latter concept is one. One object, and one only, falls under the concept “identical to zero”. Its number is therefore one. Hence the idea that through an operation of purely logical construction of concepts, it emerges that zero is counted as one, while the concept of zero subsumes in reality nothing but a blank.

⁸⁸ *Ibid.*, p. 47.

number is the appendix of the signified, which permits the above-mentioned analogy between the order of number and the order of language constrained by truth.

The second lesson is entirely bound up with the prior disclosure of the formal mechanism that is constitutive of the order of discourse. The latter is neither constituted nor deployed except as a repetition of the same operation that is constitutive of "one". The paradox, far from cancelling itself out, is the very principle of its operation.⁸⁹ This is again attested by Frege's analysis, which shows that the succession of numbers is accomplished starting from zero counted as one, by simple summation of zero, i.e. as simple repetition of the insistence of the impossible object that cancels itself out in the number of its concept, itself counted as one.⁹⁰

The non-identity that is constitutive of the order of discourse, then, in no way excludes identity, meant as self-to-self, as possibility condition of the order of meaning. A twofold condition structures every act of discourse; this too locates our distancing ourselves from J. Derrida's analyses. Our position is aimed not at deconstructing hermeneutics, but at adding a second "transcendental" of language to the one it locates in the form of a horizon of meaning.

This twofold lesson also provides an understanding of the idea that the logic of enunciation obliges us to locate the two axes that are constitutive of the linguistic process itself, namely the metaphorical axis and the metonymic axis. The symbolic process is constituted only on the basis of

⁸⁹ Hence, in an author like Jacques Lacan, the theme of the impossible meta-language and the definition of the signifier as that which represents a subject for another signifier. The term "impossible meta-language" therefore takes on here a different meaning than in Gadamer.

⁹⁰ The above-mentioned definition of zero and one allows Frege to construct, purely analytically, the relation of successor, and hence the natural sequence of numbers. It suffices to duplicate the operation of the concept each time, i.e. to repeat the operation of constructing the concept of the foregoing number. This operation of repetition is a mere summation of zero, and accordingly, *ipso facto*, a repetition of the concept of zero, whose number is one. Let us take the number three. It allows us to form the concept "member of the sequence of natural numbers terminating in three". The number assigned to this concept is four. As Miller points out in this connection: "in the order of reality, three subsumes three objects". In the order of number, which is that of discourse constrained by truth, it is numbers that we count: before three, there are three numbers, so it is the fourth. In the order of number, *there is additionally zero*, and zero counts as one. Shifting by one number ... implies adding zero. Hence the successor. (*op. cit.*, p. 45).

an operation of metaphorization, i.e. the invocation/negation of the "zero of absence" cancelled out as the number zero counted as one (that which is non-identical to itself represented by the unary feature of being identical to itself). Subsequently (successorial progression of the sequence of numbers), the chain of meaning constituted metonymically by a repetition which is nothing but repetition of the unary signifier: as J.A. Miller again rightly indicates, the sequence of numbers - the chain of meaning - is nothing but a metonymy of zero.

At this stage of our arguments, there thus emerges more clearly the operation, constitutive of discourse, that we call logic of utterance, or logic of enunciation, a starting point expressed by "logician's" logic. Here the constitution of reality as impossible unfolds, as does the operation of subsumption that is at the origin of all discourse. It is this reference of the order of discourse to a primary operation of construction of an impossible object simultaneously invoked and cancelled that marks the distance that separates our hypothesis from the hermeneutic interpretation of the repetition of meaning, conceived of as reiteration of a full, albeit unflaggingly partial, meaning. What appears here is not the Being-language identity but the radical dichotomy between the order of reality and that of language.

CONCLUSION

Our closing remarks set out from a question that brings us back to the play of the social norm and hence of law. How is one to conceive a legal judgement that takes account of the effects of the epistemological paradigm which emerge in the hollow of the paradoxical structure that is constitutive of the logic of discourse as depicted by findings of contemporary philosophy of language? How is one to rethink a model of the operation judging that will assure it wider opening and the abandonment of the constraints that inscribe it within the play of the ideal (hermeneutic and teleological logic of meaning), as well as of the dogmatic effects that the latter generates?

Undoubtedly this is one of the ways of conceiving of the needful pattern for a democratic social practice, i.e. one that is respectful of only the interplay of plurality that is constitutive of being together.

This question looks like an object for research yet to come. Let us merely note that it has been brought up by those who, in the hermeneutic crucible, have unceasingly sought to denounce what they perceive as resurgence of a past dogmatism, but we have nevertheless sought to present as logically bound up with that very hermeneutic paradigm. This is what in fact seems to us to be the ambiguity of MacCormick's and Aarnio's criticism of Dworkin's narrativist theory. Does the critical project to which it is sought

to give expression there not imply a will to combine a wager in favour of reason with a radical realization of human finitude? No-one can doubt that this aim is what hermeneutics, understood in the broad sense, has never ceased to maintain.

The fact remains that this ambiguity has to speak to us and stimulate us to query the imaginary effect that the hermeneutic operation risks harbouring, in presupposing, if only as horizon of meaning, a locus of identity of self-with-self, a point where language and reality are supposed to meet in the operation of meaning, i.e. ultimately a solution to the paradox that moves enunciation. The stakes for politics and the law are not small. The point is not to reject the action of hermeneutics, but to inscribe within the very action of the public space and of argument proper to practical discourse the awareness of impossibility that we have unceasingly to mask whenever we posit the, even unattainable, ideal of a truth.

The wager of reason has to be supported, but on condition of perceiving a properly imaginary, at the same time as it is structural, dimension of the ideal that is constantly being brought up again by the operation of meaning. If this twofold - imaginary and structural - dimension of the regulative ideas that run through reflective judgements is not seen, there is a risk of getting back to dogmatic effects, at the very point where one was seeking to fight them. Rethinking public space and hence political and legal judgement in the light of this "self-critical hermeneutics" is the project that opens up if one adopts the epistemological viewpoint resulting from highlighting the irreducibly paradoxical structure of language.

FROM THE DEDUCTIVE TO THE ARGUMENTATIVE RATIONALITY OF LAW

KARL-HEINZ LADEUR

1. PRELIMINARY REMARKS ON THE DISINTEGRATION OF THE UNITY OF THE TEXT

Albeit at the risk of a certain simplification, the assertion might be ventured that since the beginning of this century discussion about the interpretation of texts in general and of legal texts in particular has been characterized by a movement away from the paradigm of textual unity. In the following, the main development lines of a unified text appreciation will first be sketched out and then the philosophical-legal-theoretical forms of this disintegration and the beginnings of its assimilation in jurisprudence will be investigated. Finally, proceeding from concepts for the reorientation of system theory to models of "autopoietic" self-construction, outlines of a post-modern rationality of the relations among differential possibilities for the legal system will be presented.

The concept of a philosophical-scientific text appreciation, for which in Kant, or equally in Hegel's philosophy of the "objective spirit", there was no room between the objectivity of physics on the one hand and of ethics on the other,¹ began in Germany with Schleiermacher. He for the first time developed, in a counter-movement especially to the system building of the natural sciences and in disavowal of biblical hermeneutics, a reflection of the process of creating a text and of the relation to the world thereby disclosed.² Life itself expresses itself in the text and, therefore, through this means, a

¹ Cf. P. Ricœur, *Du texte à l'action. Essais d'herméneutique II*, Paris, 1986, p. 78.

² Cf. P. Ricœur, l.c. (N.1), p. 78; M. Frank, *Das individuelle Allgemeine*, Frankfurt a.M., 1977, esp. p. 87 ff.; id., *Die Unhintergebarkeit von Individualität*, Frankfurt a.M., 1986, esp. p. 118 ff.

perceptual relationship to the world is conveyable which opens up contact to the spiritual life of others. Behind this stands a notion of the absorption of knowledge of universal history by individuals; this is "Bildung", a process of "character building", which is to be understood as a generalization of the individual.

This concatenation expresses a contradiction between the non-rational forces of "life" which are capable of generalization, and the "mind" as the "objective spirit" of Heigerian stamp. This heterogeneity is indebted to "dependency upon the given that man cannot transcend, for it has been neither designed nor created by him"; and this dependency makes the "realization of reason"³ appear not as an act of production of self-transparency and self-legislation, but as a narrative process starting out from particular notions of belief and referring to a possibly shared notion of the future.⁴

These narrative aspects of the individual's linguisticity and historicity, which "de-structure the given for perception by the understanding", remain for Kant - in the Enlightenment tradition - confined to an "aesthetic affectivity, a 'processuality' of the giving which is primordial to the whole of social rational, and even linguistic activity"⁵ unstructures the tradition from the "multifariousness of what is given to the senses in a sufficiently synthetic fashion ... that it becomes suitable for subsumption under the determinant (cognitive judgement)". To that extent, Lyotard rightly says that this "foundation" as "reflexivity of single" prior to unsingle argumentation ... retains unexpected "features of immediacy" which however in Lyotard's opinion is threatened, particularly in recent decades, by *de facto* predominance of the scientific, technical and "pragmatic absorption" of the statio temporal forms of the concept.⁶ We shall return to this.

The linguistic "givens" and the opening up for individuals of the general that they make possible through the medium of interpretation are brought out by Schleiermacher in an approach that is of significance for legal thought to, whereby the grammatical interpretation familiar to jurists too is

³ Cf. K. Konhardt, *Die Einheit der Vernunft. Zum Verhältnis von theoretischer und praktischer Vernunft in der Philosophie Immanuel Kants*, Königstein/Taunus, 1979, p. 44.

⁴ Cf. A. MacIntyre, *After Virtue. A Study in Moral Theory*, London, 1981, pp. 48, 200.

⁵ Cf. J.F. Lyotard, "Grundlagenkrise", *Neue Hefte f. Phil.* 26 (1986), 1,12,24.

⁶ Cf. Lyotard, l.c. (N. 5), 13,14.

based on the generally known forms of speech with which a culture is familiar. Schleiermacher is thus referring to language not as a universal, context-independent code, but takes it to be a cultural practice, which is however, primarily dependent on creative quickening by "genius" which alone can make possible a historically individualized shaping of pattern works.⁷

Thought and action in the philosophy of the nineteenth century (until the beginning of the twentieth century) are, in the Enlightenment tradition as well as in the Romantic tradition determined by an identitarian model. In the Enlightenment tradition this identity is centred on the concept of emancipation⁸ whereas in the other, in which, for example, Schleiermacher stands, it is centred on the great personality, the genius. However different these two conceptions may be, they nevertheless agree in assuming a subject-object division: reality, nature, which is itself prestructured for this receives its *meaning* from the subject of a determination, either the subject of reason, the objective spirit or the concept (of space and time), or the subject as genius who makes possible the validation of universal-historical knowledge revealed through interpretation and empathy.

Lyotard calls this identity motif the "narrative framework" (*metarécit*)⁹ which classifies the multiplicity of incidents and traces back discourses to basic criteria of validity and at the same time excludes other incidents as not recognizable or other discourses as not valid.

2. THE MULTIPLICITY OF REALITY AND THE PROJECT OF MODERN LAW

This identity pattern may also be observed in nineteenth-century legal theory in the great controversies between the "Volksrecht" tradition shaped by F.C. v. Savigny¹⁰ and the rising legal positivism. In the end, both represent

⁷ Cf. F.D.E. Schleiermacher, *Hermeneutik*, ed. by H. Kimmerle, Heidelberg, 1969, p. 132 f.; P. Szondi, *Einführung in die literarische Hermeneutik*, Frankfurt, 1975, p. 166 ff.

⁸ Cf. J.F. Lyotard, "Histoire universelle et différences culturelles," in *Critique* 1985, 559, 560; W. Welsch, *Postmoderne und Postmetaphysik – Eine Konfrontation von Lyotard und Heidegger*, in *PhilJb* 92 (1985), 116, 132s f.

⁹ Cf. J.F. Lyotard, *Le savoir postmoderne*, Paris, 1979; id., *Le différend*, Paris, 1983.

¹⁰ Cf. F.C. v. Savigny, *System des heutigen Römischen Rechts*, Vol.1, Berlin, 1840, p. 14 ff.

variations within one unified narrative "framework": (legal) positivism accentuates the "incision" which the law makes into the unity of custom and customary law, an incision which imposes a systematic order on the multiplicity of incidents by subsuming them under a "general idea"¹¹, a pyramidal conceptual system, and thereby sets the discourse of law and the discourse about law on a basis of systematically ordered criteria. Even Laband's much upbraided late form of positivism is not primarily characterized by a "legally blind" willingness to subjugation under state sovereignty. The severance from a given normative tradition or from natural law is determined by the notion that the constraints upon a legislator will not, thereby, completely disappear but will be mediated through the recognition of legal institutions (for example contract, declaratory act etc.) prior to the legal order, rather than through some higher-ranked normativity outside the State.¹² Their recognition, however - like the order-creating, meaning-endowing role in the natural sciences of the concepts of space and time which cannot, for their part, be deduced from nature - refers to a self-referential capacity for *logical* systematizing through formation and maintenance of hierarchy and coherence between (legal) maxims, which must set its own meaning-endowing "beginning" normatively. The ambivalence therein contained of establishing and recognition, subject and system, has finally developed an explosive power reflected in the methodological pluralism of the twentieth century.

It is no coincidence that none other than Savigny can be regarded as the founder of the canon of the theory of legal interpretation,¹³ because the tradition of non-statutory positivized *Volksrecht* which he formulated has presented the learned lawyer as the creative individual whose "narrative" recounts the masterpiece that mediates between a multiplicity of incidents and universal history and gives that mediation, meaning as a particular universal. The fact that Savigny's theory of interpretation could also be taken up by positivist theoreticians shows that this conception too - even if hidden beneath the "lacunae-closing" and co-ordinative functions of legal maxims - refers to a narrative aspect of the mediation between law taken as the

¹¹ Cf. C.F. v. Gerber, *System des deutschen Privatrechts*, Jena, 1843, p. V; M.G. Losano, "Der Begriff 'System' bei Gerber", in *Gedächtnisschrift f. Ilmar Tammelo*, ed. by W. Krawietz/Th. Mayer-Maly/O. Weinberger, Berlin, 1984, pp. 647, 648.

¹² Cf. P. Laband, *Das Staatsrecht des Deutschen Reiches*, 5. Aufl., Tübingen, 1911, p. VI.

¹³ Cf. Savigny, l.c. (N. 10), pp. 212 ff.

“beginning” and the “reality” that it actually has to subsume. The vehicles of this context of reference are the culturally current understanding of words (grammatical interpretation) and the will of the legislator in the historical situation (historical interpretation).

The perception that both variants of the nineteenth-century conception of law bear the character of an identitarian *project*¹⁴ is important for the position to be developed here. The meaning of action is no longer passively obvious, it is not immanent in lived tradition or a law of nature, but requires mediation between “reality” and the active internalization/formation of a *universal* by the individuals. The individual must observe and compare his actions in the mirror of a generalized other (Adam Smith's “man within”). This is the project both of statutory law and Savigny's “*Volksrecht*”. Both variations assume that the multiplicity of reality admits of unification, indeed, is prestructured for this; in this respect, both conceptions present themselves as equilibrium models.

The modern subject is a “fictitious quantity”¹⁵ in so far as each individual must design and observe itself as an individual universal through the eyes of its representative. This presupposes a likelihood of some coincidence between the expectations ascribed to the subject and valid experience of reality.¹⁶ The multiplicity of reality can be structured in such a way by the acting subject as not to call into question the existence of a still centre around which the fluctuations move.

3. THE PHILOSOPHICAL CONTEXT OF THE DISINTEGRATION OF THE UNITY OF THE PROJECT OF MODERN LAW: HEIDEGGER AND WITTGENSTEIN

The “ideal of logicity”¹⁷ dominating codified law clearly expresses the context of reference between the starting point (beginning) in the cleavage

¹⁴ Cf. P. Costa, *Il progetto giuridico*, Turin, 1974, pp. 212, 236.

¹⁵ Cf. V. Descombes, “The Fabric of Subjectivity”, in H. Silverman/D. Ihde (eds.), *Hermeneutics and Deconstruction*, Albany, 1985, pp. 55, 64.

¹⁶ Cf. N. Negri, “Utilità e azione”, in L. Balbo et al., *Complessità sociale e identità*, Milano, 1983, p. 168; J.L. LeMoigne, “Plus les théories des organisations montent haut...”, in *Rev. Eur. des Sci. Soc.* 1987, pp. 147, 150.

¹⁷ Cf. H.G. Gadamer, “Text und Interpretation”, in Ph. Forget (ed.), *Text und Interpretation*, Munich, 1984, pp. 24, 25.

between subject and object, the establishment of law and internalization of the reference to a generalized other subject constituted by the cleavage itself.

The philosophies of Heidegger and Wittgenstein could in a simplification justified by the theme of this paper, be regarded as typifying two different ways of dealing with the disintegration of the classical reference context of knowledge, norm, "reality" and subjectivity. As far as the first way is concerned, one finds in the continuation through Gadamer's textual hermeneutics the reference of understanding to the "*structure of being-in-the-world*" turned explicitly against the "ideal of logicality". Language and textual hermeneutics take on a "dialogical character" in so far as the "starting point in the subjectivity of the subject", the "intention towards meaning", in accordance with the primacy Heidegger gives to linguistic determination of our experience of the world, is abandoned. "Reality" can no longer be separated from the text and its interpretation.¹⁸ This philosophy leaves behind the assumption of the self-transparency of the subject and its obverse, the accessibility of the multiplicity of reality through linguistic abstraction of fixed "imagined" (represented) characteristics,¹⁹ and goes over to a conception of language in which it is not meaning that is fixed but instead, in temporally changing and shifting horizons, the attempt "to engage oneself in something and with someone" that is articulated.²⁰ The hermeneutic circle is the consequence of the impossibility of "beginning" a discourse of the subject: the classical, hierarchically arranged reference context of reality, subject and normative order²¹ is replaced by assuming a horizontal reference context of situations and a trans-subjective process of understanding which constitutes - especially in legal practice - a pre-understanding already existing before any "application", which bridges the temporal distance between the norm of the past and the situation of the present by inserting a "merging of horizons" into the process.²² Ricœur has rightly pointed out that this does

¹⁸ Cf. Gadamer, l.c. (N. 17), pp. 25, 29, 33.

¹⁹ Cf. S. Benhabib, "Kritik des postmodernen Wissens. Eine Auseinandersetzung mit J.F. Lyotard, in A. Huyssen/K. Scherpe (eds.), *Postmoderne. Zeichen eines kulturellen Wandels*, Reinbek, 1986, pp. 103, 108.

²⁰ Cf. Gadamer, l.c. (N. 17), p. 29.

²¹ Cf. P. Ricœur, "Logica ermeneutica?", in *aut aut* No. 217/218, pp. 64, 66.

²² Cf. H.G. Gadamer, *Kleine Schriften IV*, Tübingen, 1977, p. 54 ff.

not mean any "consensus", but a dialectical relationship of question and answer directed at some audience.²³

This concept holds fast to the unity of meaning and this unity is - with regard to the law - strongly orientated towards law's function of avoiding or structuring controversies.²⁴ It is precisely this functional or institutional aspect which distinguishes the unity of the understanding of meaning in Gadamer's conception - "Ein Verständnis", assent to a legal text through understanding one's way into it from the classical models of interpretation: it presupposes the temporal distance between the legislator's and the legal practitioner's horizons and suggests a possibility of overcoming it through merging the horizons in the context of a history of effect.²⁵ This conception wagers everything on preunderstanding in the literal sense; whereas the classical model of interpretation promised to reconstruct the legislative interest, or to fall into line with it.

In the context we are discussing here, it must, above all, be grasped that this conception asserts a trans-subjective element of understanding²⁶ and, by emphasizing the "project" character of meaning, determined by the history of effect and limited by the horizon of the possible, brings in change that leaves behind the classical, identitarian, stable reference context of reality, subject and order.

The break with the traditional, identitarian thought-model is also characteristic of Wittgenstein, especially the Wittgenstein of the "Philosophical Investigations". Here repetition (which has become impossible) of the meaning constituted in the subject, is replaced by an element of production, though here it is not - as in Heidegger/Gadamer - the non-subjective authority of the history of the effect of a text; instead the conditions of understanding are, for Wittgenstein, determined by the organization of the quotidian.²⁷ The operational aspect of action establishes a grammar of "language games", and therewith a pre-understanding that

²³ Cf. Ricœur, l.c. (N. 21), p. 73.

²⁴ Cf. Gadamer, l.c. (N. 17), p. 29.

²⁵ Cf. Gadamer, l.c. (N. 17), p. 29.

²⁶ Cf. Welsch, l.c. (N. 8), p. 119.

²⁷ Cf. J. Bouveresse, "Meaning and Understanding", in H. Parret (ed.), *Herméneutique et linguistique*, Berlin/New York, 1981, pp. 112, 123; also Ricœur, l.c. (N. 1), p. 84.

precedes any construction of possible meaning. What in Gadamer is still given the temporal distance between the horizons of text production and textual understanding, explicitly justified as legitimate pre-judgement - Ricoeur²⁸ rightly speaks here of "linguistic idealism" - becomes in Wittgenstein an implicit presupposition of every distinction between truth and falsehood.²⁹ The language game is something that convinces, it is merely the background against which distinctions can be made at all. The heterogeneity and multiplicity of limited language games is the consequence of the Kantian epistemological "beginning" in the subject, which has become impossible.³⁰

In Heidegger/Gadamer understanding, after the break with the "beginning" in the cleavage between subject and object, takes on a non-methodological aspect of ontological implication as to being,³¹ of reference to the world. However, it is doubtful whether the inaccessibility and untransparency of the historical presuppositions of all knowledge affirmed thereby can for the subject in the end successfully evade the transcendentalism of the self-transparency of the subject without having to revert to the "objective spirit" of Hegelian origin or of history.³² In Wittgenstein, at all events, the language games have the character of "generative living words" whose "inaccessibility is positive and obvious."³³ Here Wittgenstein goes one step further by accepting the heterogeneity of situations and the fragmentary character of meaning as well as of the diffuse subjectivity of the everyday world.

4. MANIFESTATIONS IN LEGAL THEORY OF THE DISENTEGRATION OF THE CLASSICAL CONCEPT OF UNITY

The dissolution of the classical reference context of "reality", subject and legal text in jurisprudence and the philosophy of law in the first third of the

²⁸ Cf. Ricoeur, *l.c.* (N. 21), p. 76.

²⁹ Cf. Bouveresse, *l.c.* (N. 27), p. 117.

³⁰ Cf. Ricoeur, *l.c.* (N. 21), p. 66.

³¹ Cf. Ricoeur, *l.c.* (N. 21), p. 90.

³² Cf. Ricoeur, *l.c.* (N. 21), pp. 87, 91; *id.*, *l.c.* (N. 1), p. 97.

³³ Cf. Welsch, *l.c.* (N. 8), p. 117.

twentieth century may be demonstrated in exemplary fashion by some of their most important variants. In P. Heck's jurisprudence of interests and evaluation, "reality" claims an independence as the source of "life-values and interest-values" vis-à-vis legal texts; reality is no longer merely "geared to" subsumption under the textual norm.³⁴ It develops its own claims to order.

In Kelsen's "pure legal theory",³⁵ a form of reduction of the logical-systematic, deductive character of law asserts itself which renounces the global project-character of the legal system in favour of mere systematizing and hierarchy-building of competences and withdraws the claim of the legal system to subsume the multiplicity of reality under the ordering form of the law in the *methodological* assumption of a "basic norm" for the "graduated building" of the legal order. This immediately lends increased significance to the process of parliamentary democratic decision.

In another form, in R. Smend, the maintenance of the project-character of the law becomes self-reflexively more of an autonomous task for the law: in classical jurisprudence, the subject, as the individual "universal" had functioned, "through internalization of the view" of reality through the eyes of the generalized other, as the instance for mediating between the multiplicity of facts and the unity of the legal order. In a world in which reality itself appears less and less as permanently determined and more and more as differentially and variably organized, the "integration" of the reference-contact of reality, subject and law becomes the task of law itself and, therewith, becomes an issue for legal theory. Given the instability of reality, the unity of the law must be produced as a process: the growing transformation of distinct actions - earlier arranged according to a global model of equilibrium - into an organized relationship-network leads to a fragmentation of subjectivity; the questioning of the mediating instance which had guaranteed the unity of the classical model, demands the *creation* of unity, integration, and, therewith, the institutionalizing of a self-observing capacity of law within an overall process of social change geared to self-change.³⁶ (One might remark in passing that in the "laboratory of

³⁴ Cf. Ph. Heck, *Das Problem der Rechtsgewinnung*, Bad Homburg v.d.H., 1968; also W. Krawietz, *Juristische Entscheidung und wissenschaftliche Erkenntnis*, Wien/New York, 1978, p. 197.

³⁵ Cf. H. Kelsen, *Reine Rechtslehre*, 2. Aufl., Wien, 1960.

³⁶ Cf. F. Pardi, *L'osservabilità dell'agire sociale*, Milano, 1985, p. 13.

Weimar" the experience of the loss of unity in practice instead promoted catastrophic solutions).

In Max Weber too this element of loss of the unity of the classical reference-context asserts itself: the multiplicity of *reality* has taken on a threatening, irrational, chaotic formlessness which no longer seems to be geared to the possibility of unitary stable meaning, of *one* rational systematized form of order³⁷ The infinite, variable, process of transformation is without meaning; meaning presents itself as bound to a standpoint of the subjects, as one *construction* amongst many possible.³⁸ Attributions of meaning are an expression of a belief, of an ascribing of values, dependent on interest. Such attributions of meaning are only possible (but also necessary) as distinctions which isolate one aspect, one part of the process of transformation, and thereon build a *formal* rationality of the efficient systematizing and co-ordination of practical operations.

5. IN PARTICULAR: THE NEW "THEORIES OF ARGUMENTATION"

In the current legal theoretical debate, the theme of unity will again be followed, in two variations which, however, have in common that they have explicitly left being the classical model of the unity of the world which was based on the reference-context of "reality", subject and legal order, and whose disintegration during the Weimar period could only be experienced as crisis, and treat unity henceforth as only the goal of legal discourse.³⁹ It is commonly agreed today that the logical-deductive model of the unity of the legal system has lost its foundations; but it must be doubted whether the significance for the self-perception of society of the resulting loss of the classical project-character of law has been sufficiently taken into consideration. Nevertheless, there can be no talk of methodological certainty: in many recent legal-theoretical analyses, there is a professed adherence to

³⁷ Cf. M. Weber, *Wissenschaft und Gesellschaft*, 5. Aufl., Tübingen, 1980, p. 196.

³⁸ Cf. E. Severino, *La filosofia contemporanea*, Milano, 1986, p. 175.

³⁹ Cf. A. Peczenik, *Grundlagen der juristischen Argumentation*, Wien/New York, 1983, p. 167; cf. also the critique in J.M. Brockman, "Die Rationalität des juristischen Diskurses", in W. Krawietz/R. Alexy (eds.), *Metatheorie der juristischen Argumentation*, Berlin, 1983, pp. 89, 98.

plurality of methods⁴⁰ and to the dependence of the results of even methodically disciplined legal thinking on interests and values.⁴¹

If one proceeds from the question of guaranteeing the unity of legal discourse, a methodological variant may first be distinguished which has transferred the classical postulate of logical-deductive binding by statute into a procedural rationality of argumentation, a practical binding in discourse, following the laws of language. Language is thereby - even if this is not equally true of all representatives of argumentation theory - presupposed, as a relatively autonomous phenomenon.⁴² Alexy⁴³ assumes the necessary reference of legal argumentation to ideal conditions of agreement - to that extent, he goes beyond Habermas's⁴⁴ concept of the communicative rationality which distinguishes between strategic and discursive arguing. What gain in rationality does the legal system get from this replacement of the hierarchical-deductive model of subsumption by recourse to a general, linguistic, discursive rationality of argumentation? The commitment to argumentation opens, on this view, a "horizontal" connexion to a fictitious audience whose consent establishes rationality⁴⁵ and, in this proceduralized form, constitutes the unity of law as a process which consummates itself in time⁴⁶.

⁴⁰ Krawietz, l.c. (N. 34), p. 197.

⁴¹ Cf. A. Aarnio/R. Alexy/A. Peczenik, "Grundlagen der juristischen Argumentation", in Krawietz/Alexy (eds.) l.c. (N. 39), pp. 9, 52, 78; concerning the concept of "form of life" see also Peczenik, l.c. (N. 39), p. 208; A. Aarnio, *The Rational as Reasonable*, Dordrecht, 1987, p. 216 f.

⁴² Cf. Broekman, l.c. (N. 39), p. 110; A. Aarnio, "Argumentation Theory and Beyond", in *Rechtstheorie*, 1983, pp. 385, 390; R. Alexy, *Theorie der juristischen Argumentation*, Frankfurt, 1978, pp. 32 ff., 263 ff., 349 ff.; *idem*, *Theorie der Grundrechte*, Frankfurt, 1986, p. 498 ff.

⁴³ Cf. Alexy, *Theorie der juristischen Argumentation* (N. 42), p. 239.

⁴⁴ Cf. J. Habermas, *Theorie des kommunikativen Handelns*, Vol. 1, Frankfurt, 1981, p. 385 ff.

⁴⁵ Cf. Aarnio, l.c. (N. 42), p. 399.

⁴⁶ Cf. Broekman, l.c. (N. 39), p. 110.

The fact that, thereby, reference is made back to Wittgenstein's concept of "Lebensform"⁴⁷ (form of life) does not exactly contribute to the consistency of the argumentation-theory, for there the "language game" as with Gadamer's concept of the hermeneutic circle - serves, given the impossibility of a "beginning" in the epistemological subject, to define a pre-understanding which already was there and precedes every possibility of distinguishing a point of view or a method of understanding. Ultimately, however, with the postulate that there is a practical reason, immanent in argumentation and its rules of coherence, a meta-institution, the possibility of which Wittgenstein denied, is referred to. Indeed, this denial can even be regarded as the central assumption of the "Philosophical Investigations".⁴⁸ The reference to an "ideal speech situation", supposed to be inherent in legal discourse, cannot be propped up through the grammar of "language games" in Wittgenstein's sense. Language games are always dependent on fields of *action*⁴⁹ in the sense that - in Spencer Brown's terms - every recognition is dependent on a distinction drawn against an inaccessible, transparent background, which it must, therefore, accept: though not as the source of truth - the role in which "the tradition" of question and answer functions in Gadamer - but as the condition for any kind of distinction at all.⁵⁰ "Language games" are, therefore, necessarily plural⁵¹ and, because they are integrated into a reference-context of *actions*, irreducible. They cannot, therefore, be made transparent in a process of argumentative justification, because they remain bound to the inexhaustible multiplicity of the possibilities of meaning produced through the field of action.

In Perelman's apologia for rhetoric in jurisprudence, this aspect of binding - understood in the literal sense - through interest of an audience addressed in

⁴⁷ Cf. Aamio, l.c. (N. 41), p. 216s.; Alexy, *Theorie der juristischen Argumentation* (N. 42), p. 74 ff.; and L. Wittgenstein himself in *Philosophische Untersuchungen*, 2nd ed., Frankfurt, 1980, No. 19, 23, 241, 325; idem *Über Gewißheit*, Frankfurt 1970, No. 102, 105.

⁴⁸ Cf. Bouveresse, l.c. (N. 32), p. 138 f.

⁴⁹ Cf. Wittgenstein, *Über Gewißheit* (N. 47), No. 204.

⁵⁰ Cf. Bouveresse, l.c. (N. 32), p. 117.

⁵¹ Cf. Bouveresse, l.c. (N. 32), p. 130; Welsch, l.c. (N. 8), p. 117; J.W. Murphy, "Une rhétorique qui déconstruit le sens commun: J. Derrida", in *Diogène* no. 128 (1984), pp. 125, 128.

discourse is much more clearly accentuated.⁵² This interest is ultimately linked back to the authority of an institutionally established "agreement". This element is also expressed in the topical-rhetorical conception of Viehweg,⁵³ amongst others. Argumentation here remains pragmatically bound to the clarification of a situation against a background determined by a problem; the rhetorical aspect consists in "dialogue" with a claim to authoritative decision⁵⁴ Through the relationship between question and answer, however, authority itself is not called into question. The significance of institutions and of models of interpretation determined by them for mediating between application and problem-situation is - in this line of tradition - also emphasized by T. Seibert.⁵⁵

In a methodologically less elaborated but more practice-related variant, Häberle,⁵⁶ most notably includes different, specific audiences (institutions, associations, organizations, etc.) in the explanation of "case-structures", as referred to above all by constitutional law. In this way, it becomes clear that "concretization" - which has replaced classical interpretation - aims at the "consensus" of a specific circle of addressees constituted by a field of action, and does not postulate abstract agreement with a universalistic claim to rationality of law. "Consensus" presupposes not general agreement but active specific readiness to coordinate.

From these more recent methodological approaches, here brought together generically, rightly or wrongly, as "argumentation theory",⁵⁷ I would like to distinguish those which - here in agreement with argumentation theory - have similarly broken with the classical, deductive paradigm but do not re-

⁵² Cf. Ch. Perelman/Olbrechts-Tyteka, *The New Rhetoric: A Treatise on Argumentation*, Notre Dame/USA, 1969; Murphy, l.c. (N. 51), p. 129.

⁵³ Cf. Th. Viehweg, "Reine und rhetorische Rechtslehre", in *Rev. Inter. de Phil. du Droit*, 1981, p. 547; cf. also Ch. Perelman, "On legal systems", in *J. of Social and Biological Structures*, 1984, pp. 300, 304.

⁵⁴ Cf. also U. Neumann, *Juristische Argumentationslehre*, Darmstadt, 1986, p. 55.

⁵⁵ Cf. Th. M. Seibert, cf. also St. Toulmin, "Die Verleumdung der Rhetorik", in *Neue Hefte f. Phil.* 26 (1986), pp. 55, 63.

⁵⁶ Cf. P. Häberle, "Die offene Gesellschaft der Verfassungsinterpreten", in *Juristenzeitung*, 1975, p. 297; cf. also F. Müller, *Strukturierende Rechtslehre*, Berlin, 1984, p. 169 ff.

⁵⁷ For functional aspects cf. G.F. Schuppert, *Funktionellrechtliche Gesichtspunkte der Verfassungsinterpretation*, Königstein/Taunus, 1980.

gard a methodologically reflected legal-theoretical "re-formulation of the problem of meaning"⁵⁸ as possible assumptions about "effectiveness and consequence problems" of decisions. The perspective of the conceptions characterized by this criterion is rather more orientated towards the institutionalized tasks of the State, whilst the "argumentation theories" are much more interested in reconstructing a practical rationality of "pluralistic" arrangements between social groups.

This second line of development seeks a new approach to juridical system-formation not in the re-vitalization of the classical model of the interpretation of hierarchicalized legal maxims, but rather in a renewal of the system-building resources of law aided by decision theory:⁵⁹ this conception takes up the claim of the classical systematizing of the legal maxims and addresses it now to the selection function of the *decision*.⁶⁰ It runs against the "unjustified claim to autonomy of the dialectical-hermeneutic jurisprudence" of Larenz, which carries on the classical model, and tries to establish an independent juridical rationality in the methodologically reflected capacity of the decisions to link up with one another. Such a rationality must adjust its horizon to "empirically valuable, in content clearly outlined, precisely circumscribed or at least circumscribable aims and purposes of law".⁶¹ This means that the claim of the law as a model with "definitions of aims and valuations to be made concrete" in the decision has to be amplified through reflection on contexts of effect, intended and unintended consequences and secondary effects of decisions.

In a similar manner - again less elaborated theoretically but closer to practice - Böckenförde (in contrast to Häberle) demands a rationality and objectivity of the decision which is supported by a "secured juridical method". Objectivity is, thereby, to be guaranteed by "criteria and standards of argumentation, which are inter-subjectively mediated and verifiable". Against the background of emphasis on the State as an organized *unit* of effect which, by means of a "law-required order", "stabilizes" and "maintains" itself as such,⁶²

⁵⁸ Cf. Krawietz, l.c. (N. 34), p. 214.

⁵⁹ Cf. W. Krawietz, "System und Rationalität in der juristischen Dogmatik", in *Rechtstheorie* (Beiheft 2), 1981, pp. 299, 329, 355.

⁶⁰ Cf. Krawietz, l.c. (N. 58), p. 307.

⁶¹ Cf. Krawietz, l.c. (N. 58), p. 335.

⁶² Cf. Krawietz, l.c. (N. 58), p. 330.

this position takes on clearer outlines precisely through the negative demarcation from Häberle's position of socially pluralist language games and consensus-finding procedures. Because under the conditions of disintegration of the classical reference context the methodological certainty of the standards of argumentation has become a problem, a non-hierarchical, procedural aspect of the transformation of law cannot be renounced on this view either; the pressing back of the dynamic, socially-plural factor of consensus *formation* is here expected evidently - even if this is not explicitly formulated - more from the teachers of constitutional law as a kind of "interpretive community"⁶³ that is more remote from fragmented group-procedures.

A related variant of the guaranteeing of juridical rationality is to be seen in recourse to the constitutional court's decision-making procedure.⁶⁴ By comparison with the classical hierarchical model, this institutional construction seems rather indeterminate. Even if in fact a procedural form of unity of law through maintenance of the horizontal capacity of decisions for linkage as outlined by Krawietz - has something to be said for it, the phenomenon of the coming together of different discourses which "comment on dispute and rethink one another"⁶⁵ without there being one unambiguous criterion for correctness/truth and falsity, still remains in need of explanation. Recourse to Popperian falsificationism⁶⁶ cannot offer a sufficient explanation because legal decision distinguishes itself specifically through its authority from the scientific hypothesis which is geared to falsification. The procedure of falsi-

⁶³ Cf. St. E. Fish, *Is there a Text in this Class-room? The Authority of Interpretive Communities*, Cambridge/Mass., 1982, who regards the (literary) text as nothing but a product of institutionalized convention. This kind of "institutional determinism" (G. Ferretti, "Il testo secondo Stanley Fish", in *alfabeta 101* (1987), p. 12), which is also inherent in legal theories of argumentation, neglects the process of intertextuality, as did traditional concepts of interpretation as reconstruction of the author's intention.

⁶⁴ Cf. M. Kriele, *Theorie der Rechtsgewinnung*, 2nd ed., Berlin, 1976, esp. p. 258 ff.; Alexy, *Theorie der juristischen Argumentation* (N. 42), p. 339; *idem*, *Theorie der Grundrechte* (N. 42), p. 504 ff.

⁶⁵ Cf. W. Welsch, "Nach welcher Moderne? Klärungsversuche im Feld von Architektur und Philosophie", in P. Koslowski/R. Spaemann/R. Löw (eds.), *Moderne oder Postmoderne?*, Weinheim, 1986, pp. 237, 240; cf. also *idem*, *Unsere postmoderne Moderne*, Weinheim, 1987, esp. p. 296 ff.

⁶⁶ Cf. B. Schlink, "Bemerkungen zum Stand der Methodendiskussion in der Verfassungsrechtswissenschaft", in *Der Staat*, 1980, p. 73.

fication, however, gains its rationality from just this assumed freedom of the discourses of the scientific community from domination. In the end, its decision-theory variant is again based on the assumption of an institutionalized reason.

6. INTERIM SUMMARY: THE LAW BEFORE THE DISINTEGRATION OF THE REFERENCE CONTEXT OF REALITY, SUBJECT AND ORDER

All the recent legal-theoretical approaches sketched here as examples, which overlap in detail even more than has been pointed out, have, for the purposes of the investigation in hand, been confronted with the phenomenon of the disintegration of the classical context of reference between reality, subject, and legal order. This reveals a problem common to the different variants, arising from the change in the relationship between legal practice and methodological reflexion on it: the constitutive character of *distinctions*, emphasized above all by Wittgenstein, has brought together justification and action into a context within language games, because acting can no longer "go without saying" or be directed by itself. This problem also re-appears in one form or another in the variants of the methodological debate in jurisprudence discussed here. Jurisprudence too faces the problem of the plurality of possibilities: the law no longer guarantees a unitary, stable order. It no longer first becomes statute and then is applied, but proves to be an organized and organizing phenomenon which must make itself permeable to the change and fragmentation of reality. In doing so, law develops a new functional component which goes beyond the application of rules and demands a different methodologically-reflected self-description, sensitized for selection among a variety of possibilities. Classical law could be considered as a programme which was not changed through its application. In this connection it is unimportant that this assumption was itself largely fictional; it nevertheless *functioned* as such. In the new legal model there is no longer this clear stratification of levels: legal *strategies* construe and modify themselves along with the fields of action.⁶⁷ This is due to the fact that the legal system has less and less to do with single actions and single subjects but with relationship-networks and differential, fragmented and organized subjects.

One question that cannot yet be answered is whether the problem of the disintegration of the classical reference context has been argued out in today's

⁶⁷ Cf. E. Morin, *La méthode 3: La connaissance de la connaissance*, Paris, 1986, p. 50.

methodological debate through an appropriate self-description of the legal system, and not merely dealt with pragmatically. The following analysis should, through a comparison between the philosophical and the jurisprudential debate, bring us a step nearer to answering this question.

7. PARALLELS BETWEEN PHILOSOPHICAL AND JURISPRUDENTIAL DISCUSSIONS OF METHOD

Relating the jurisprudential discussion of method to the development of the philosophies of Heidegger/Gadamer and Wittgenstein, it is not hard to find jurisprudential versions of Gadamer's "legitimate prejudice" regarding binding by authority, or variations of Wittgenstein's main idea that speech is bound down to fields of action, with the limits that sets to the accessibility of the truth/rightness or falsity of justification. Argumentation theory in particular adds yet a third motif, a continuation of universalism which replaces Kant's epistemological subject and its conceptual reason by the intersubjectivity of reflection on language rules, and therefore of understanding. However, confidence in the tenability of this universalistic proceduralism of the self-enlightenment of "practical reason" is, as the extra propping up of argumentation theory by Wittgenstein's "form of life" proves, not very great: and rightly, for if the subject is once dethroned, then the "procedurality" of the "giving" (*Gebung*) has to be abandoned, and - as Lyotard has raised in objection to Apel - it is no longer entirely clear how "communication (this relation between an other and an ego, who are assumed to be similar) could lead directly to a reflection on the laws of their speaking".⁶⁸ On the other hand, this makes heterogeneity of reality in the Apel/Habermas philosophical model⁶⁹ perceptible only as a limit to communicative reason that has to overcome, whereas the jurisprudential version of argumentation theory accepts the limit set by the "form of life" as immanent. But this in turn makes the fundamental claim of argumentation theory finally subject to the bonds of the form of life and to the rules of the "language games" shaped by them, which rules cannot be reflected on through communication between other and ego.

⁶⁸ Cf. Lyotard, l.c. (N. 5), p. 11.

⁶⁹ Cf. K. O. Apel, "Spechakttheorie und transzendente Sprachpragmatik", in *idem* (ed.), *Sprachpragmatik und Philosophie*, Frankfurt, 1976, p. 10 ff.

Taking this into consideration, the problems between the philosophical version of the incorporation of language and everyday world into the Wittgensteinian "form of life" and the rhetorical, topical, situational, consensual or decision-theory methodological approaches of argumentation theory in legal science become clearer still.

It is precisely the contradictory combination of two differing structural elements of the theory (rational discourse and "form of life") in argumentation theory which, however, makes a lack visible in the current methodological debate which can also be observed in other variants: it is true that all models work at the disintegration of the logical-deductive proof-paradigm, but the assumption that *unity* as an aim of the legal system is possible and remains meaningful expressed here too in the assertion, as the basis of the new "horizontal", transformatory, procedural elements of the formation of law, of a meta-rule - in contradicition to Wittgenstein's version of the "language game".

This becomes particularly clear in Alexy,⁷⁰ who wants to compensate for the limited potential of legal rules for systematization and rationality through the meta-rule of rule-bound speech or argumentation about situationally determined sets of problems. But Böckenförde⁷¹ and Krawietz too make the model of a pre-set rule which has to be acknowledged as validly paradigmatic: accordingly, the only legal arguments admissible are those which are case-based, oriented to specific problems and measurable according to empirically verifiable criteria (unless statute admits applications accessible by traditional methods). In this context, for Böckenförde, the stabilizing of the State as organizationally operating unit is considered as a unity-endowing rule; this organizational reproduction of the State as a centre of action operates as a selection criterion for admissible legal judgements. This is turned polemically against Häberle, who instead sees unity as guaranteed through a plural process of consensus of groups and institutions going beyond the State. It is no coincidence, therefore, that the German Constitutional Court is called a "societal court" which brings about social arrangements among the pluralistic groups - mediated through "language games" examined by it for mutual compatibility- and which must move the groups not only to compliance but to productive internalization of

⁷⁰ Cf. Alexy, *Theorie der Grundrechte* (N. 41), p. 144 ff.

⁷¹ Cf. E.W. Böckenförde, "Die Eigenart des Staatsrechts und der Staatsrechtswissenschaft", in *Festschrift Scupin*, ed. by N. Achterberg/W. Krawietz/D. Wyduckel, Berlin, 1983, pp. 317, 324.

constitutional court decisions.⁷² This is what the recent methodological debate comes down to: revoking the classical autonomy of the legal system as a system of legal maxims, partially replacing it by a horizontal, procedurally integrated system of single legal actions which are to be adjusted to one another and simultaneously to the function of the maintenance of an organized functional unit (of the State and/or of the groups). It is in their conception of this functional context that the methodological variants differ most strongly.

8. LIMITS OF THE EVOLUTION OF THE RECENT LEGAL-THEORETICAL METHODOLOGICAL DEBATE

All the methodological variants outlined have in common that they register fluctuations in the development of "reality" which cannot be processed in stable rules and that this too must show itself as a loss of certainty in methodologically reflected decision-making. Krawietz's⁷³ statement that "in present circumstances, there is no methodological rationality guarantee for correct results of legal decision" can represent many. We would refer here only to Alexy, who, especially in the area of the norms of fundamental rights, to which, in his view, "the character of principle" is to be ascribed, considers "weighing" (*Abwägung*) as indispensable. "The process of weighing is a rational procedure but it is not a procedure which in every case leads exactly to one solution. Which solution is considered right after a weighing depends on evaluations which themselves are not controllable through the process of weighing."⁷⁴ In this sense, weighing is an open procedure.⁷⁵ The openness of the weighing, however, leads to an openness of the legal system, which system is determined in content by norms on fundamental rights."⁷⁶

⁷² Cf. F. Hase/K.H. Ladeur, *Verfassungsgerichtsbarkeit und politisches System*, Frankfurt, New York, 1980; I. Ibsen, *Das Bundesverfassungsgericht als Element gesellschaftlicher Selbstregulierung*, Berlin, 1985.

⁷³ Cf. Krawietz, l.c. (N. 44), p. 183.

⁷⁴ Cf. Alexy, *Theorie der Grundrechte* (N. 42), p. 494.

⁷⁵ Cf. G. Haverkate.

⁷⁶ Cf. Alexy, *Theorie der Grundrechte* (N. 42), p. 144.

While such losses of certainty widen the span of fluctuation of the possibilities, they do not ultimately call into question the possibility of a "fixed, still centre" to be guaranteed specifically through methodological reflection, around which the fluctuations move. In one of these variants, its "fix is seen as guaranteed primarily by the compulsion towards "empirically substantial" giving of reasons for decisions not unambiguously regulated by legal maxims, whilst the other variant sees "weighing" as an optimization problem to be dealt with by formulating "conditioned laws of preference", whereby it is not their laying down but the reason for them which is rationally controllable.

Here, however, a problem arises. It cannot be solved by simply acknowledging "openness" or admitting the breadth of fluctuation of several "correct" legal decisions: the claim to objectivity and rationality of the classical "pyramidal" system of legal maxims was based specifically on the assumption that "reality" is accessible to ordering by a "comprehensive idea" (Gerber), and conversely that only this "receptivity" towards the "giving of the other" (*die Gebung des Anderen*)⁷⁷ which makes this ordering possible, an "affectivity" before reflexivity, before argumentation, makes systematic conceptual cognition possible for the subject. It is true that critical modernity is, with Kant, based on the assumption that reality as such is not knowable, but it has assumed an isomorphism in so far as at least the structuring and systematizing of our experiences by concepts is possible, and therefore that we know how we form our experience of reality. It is here, too, that the central position of the subject at the point of intersection between the multiplicity of reality and the unity of the legal order is constituted: the experiencing subject and the reflecting subject, with its conceptions, are in a relationship of correspondence.⁷⁸ The heterogeneity of experiencing and of conceptual and systematic reflection would thus on the one hand be constituted through the incision in the flux of events that separates subject and object, but would at the same time also be limited by it.

In the romantic developmental variant of modernity, this limitation is instead achieved through the narrative relationship of "empathy" with great individuals as representatives of the possibility of personifying the universal, making possible the "formation" of the individual and therefore the ordering of action according to ideas.

⁷⁷ Cf. Lyotard, l.c. (N. 5), p. 24.

⁷⁸ Cf. P. Livet, "Simulation et représentation", in A. Demailly/J.L. Le Moigne (eds.), *Sciences de l'intelligence - sciences de l'artificiel*, Lyon, 1986, pp. 274, 277.

This problem of the heterogeneity of experiencing and reflection on the one hand and of their limitation on the other is not adequately treated in the recent methodological debate in legal sciences: "reality" with which both philosophy and jurisprudence are faced has become considerably more complex than our notions as determined by the classical paradigm.⁷⁹ In classical philosophy and jurisprudence, the action of the subjects plays an important pivotal role between the multiplicity of reality and conceptual, systematic notions of order, for the correspondence-relationship between subject and object, indeed its identity in Kantian philosophy, is only possible because our cognition is determined through action. The subject can only perceive that to which it can develop a "productive relationship". Conversely, the self-relationship of the ego is only possible as something indirect, as a relationship of reciprocal representation of ego and world.⁸⁰ Therefore, there is in the classical, liberal legal model this necessarily circular relationship, the original agreement of the subject, of its relationship to reality and to the legal order, whereas recent jurisprudential methods, precisely on account of the disappearance of this basic agreement, try to postulate a new, circular reference context in the autonomy of language.⁸¹

It is very doubtful whether the call for a "coherent language" or the development of a linguistic pragmatics which binds reflection about law to particular language games/forms of life can by itself cope with the problem of the increase in complexity of reality in relation to the notions of the subjects. The complexity of "reality", society's increased capacity for self-modification which even threatens to call its identity⁸² into question, suggests the search for a more complex model of reflection that ought to take as its theme the consequences of the loss of unity of the legal system.

⁷⁹ Cf. Livet, l.c. (N. 77), p. 279.

⁸⁰ Cf. G. Körtian, "Par-delà de l'identité moderne", in *Critique*, 1987, pp. 337, 342, 344.

⁸¹ Cf. Körtian, l.c. (N. 80), p. 338.

⁸² Cf. A. Touraine, "Les deux faces de l'identité", in *Quaderni di Sociologia*, 1979, pp. 407, 409.

9. A NEW EVOLUTIONARY STEP TOWARDS A "SECOND-ORDER PROCEDURALISM"

A further development of argumentation theory could take as a starting point the misunderstanding described above, expressed in the attempt to limit that openness originating with the replacement of deductive logical derivation by the process of argumentation, through recourse to Wittgenstein's "form of life". The proceduralism of argumentation theory attempts to repeat the blending of linguistic logical coherence of a given meaning which can be re-activated through subsumption and of the postulated coherence of the chain of events of life in the relationship of self-modification of society on the one hand and in the search for coherence in a procedure of self-definition from meaning. The "form of life" serves hereby as a fixed point before the abyss of infinite regress. However, the solution seems plausible only at first glance: the language of the law is caught up in the process of change of meaning over historical time and orientates itself not to the rule itself but to regularity as such, a coherence which seems to manifest itself in the normality of the everyday "form of life". But Wittgenstein's "form of life" itself only accentuates a procedure and not a basic rule (meta-rule) to "apply" the "forms of life". This method consists in considering the pattern to which language chains us, before we make the first move, as a relational, combinatory, generative phenomenon.⁸³ The method is, therefore, itself a way of destabilizing the one reality,⁸⁴ because every verbal communication takes on a strategic character whose generative potential, which makes possible future combinations, always points beyond the present intentions of the speaker.⁸⁵ Thus there comes into being a continual modification of the semantic fields, a creative modification which affects the rules themselves and thereby produces an indefiniteness which cannot be overcome by recourse to a fluctuating range of different, and equally tenable, rational solutions.

This means not disavowing every possibility of the production of coherence⁸⁶ through procedure, but instead stressing the need to refer the self-re-

⁸³ Cf. H. Straten, *Wittgenstein and Derrida*, Lincoln/London, 1986, p. 80; concerning legal reasoning cf. M.G. Losano, "La competenza interpretativa del diritto naturale", in *Fenomenologia e società*, X (1987), pp. 70, 134.

⁸⁴ Cf. Straten, l.c. (N. 82), p. 75.

⁸⁵ Cf. G. Fauconnier, *Mental Spaces. Aspects of Meaning Construction in Natural Language*, Cambridge /Mass./London, 1985, pp. 1 ff., 168; R.H. McKinney, "Toward a Resolution of the Modernist/Postmodernist Debate", in *Philosophy Today* (Fall), 1984, pp. 234, 239.

flexive element of discursiveness which appears in argumentation theory back to the theory and to make it more permeable to heterogeneity: the procedure, the search for the coherence of arguments, always contains a projective element in so far as it constructs *one* possibility on the horizon formed from the actual moves made and from stored-up patterns. But in a proportion which increases with the self-modification capacity of society, projective thinking therewith encounters its own distinctions, a mixture of fact and fiction which will increase still further with the expansion of the electronic media. The acceleration of change makes visible a dynamic of self-organization, the coexistence of order and disorder in the game of differences,⁸⁷ which also encompasses the formation of knowledge and, therewith, the viability of arguments.

The need to adapt perspectives to self-organizing networks and pattern-formation has grown with the development of new, complex problems of regulation and interpretation for which the continuity of practised routine offers no possibility of linkage (for example, the development of advanced technologies). To deal with these new problems of the self-modification of society, the procedural concept of the theory of argumentation must be supplemented by a self-referential element which builds into the procedure itself the provisional, projective character of legal argumentation in the form of constraints towards self-revision, making possible the reversability of strategies for action and the multiplication of options and alternatives.

The picture of a "parallel processing system" may have a heuristic function here, especially since it signalizes the onnipresence of the circularity of (self-) observation: even in research on brain function, the (self-) observer discovers a plurality of distributive processes which admit multiple developmental trajectories and make possible integration through a high degree of flexibility instead of by coherence.⁸⁸ M. Minsky, one of the leading re-

⁸⁶ Cf. as an example of Anglo-Saxon trends in legal argumentation theory R. Dworkin, "Law as Interpretation", in *Critical Inquiry*, 1982, pp. 179, 195; *idem*, *Law's Empire*, Cambridge/Mass., 1986, esp. p. 93 ff.; but Dworkin's – as well as the abovementioned German authors' – concepts of "coherence" and "integrity" still refer to a predetermined identitarian model of legal reasoning centred on the institution of the judge.

⁸⁷ Cf. I. Prigogine, "Exploring Complexity", in *Eur. J. of Operational Res.*, 1987, pp. 97, 98; G.J. B. Probst, *Selbstorganisation. Ordnungsprozesse in sozialen Systemen*, Berlin, Hamburg, 1987, p. 61.

⁸⁸ Cf. P. Thagard, "Parallel Computation and the Mind-Body-Problem", *Cognitive Science*, 1986, pp. 301, 309.

searchers on artificial intelligence, has summed up the heterogeneity and plurality of the ways in which the brain functions, the phenomenon of emergence, in the following succinct formula: "There exists, inside our brain, a society of different minds." He sees the main characteristic of brains to be that "they use processes that change themselves" and this means that such processes cannot be separated from the products which they produce.⁸⁹

This new concept of self-changing processes must also be made productive for any second-order argumentation theory proceduralism. Such a theory of argumentation must build on connexion-possibilities and connexion-restraints which have been created by previous moves. But under conditions of uncertainty and complexity and, therewith, of increasing significance of the projective-constructive element of juridical argumentation, it must seek, rather, to guarantee flexibility and a wealth of alternatives and thus maintain a productive relationship between order and disorder through which new relational patterns will always be generated in the interplay of difference. To this extent, the preserving function of the law is, paradoxically, reversed: the continuity which the law must make possible is a continuity of self-modification which must aim at coherence but is repeatedly encroached upon by processes of self-organization. (This does not mean that this new form of procedural rationality is itself an exclusive model. It is rather a new layer of a kind of post-modern rationality adapting to new forms of social complexity. It develops in conflictual coexistence with modern forms of deductive and argumentative rationality remaining viable in less complex fields of individual and organized actions. The self-deconstructive character of the interplay of partial moments of reason no longer allows for the project of an identitarian surface of signification. It can only be made viable by letting different texts and contexts carry out their interpretive procedures).⁹⁰

⁸⁹ M. Minsky, "The Society of Mind", in *Whole Earth Review*, Summer, 1986, pp. 4, 10.

⁹⁰ Cf. G. Genette, *Narrative Discourse*, Ithaca/N.Y., 1983; A. Wellmer, *Ethik und Dialog*, Frankfurt, 1986, p. 171 f.

INTERPRETATION IN LEGAL SCIENCE

THE NOTION OF NARRATIVE COHERENCE

PATRICK NERHOT

In his definition of interpretation, Kelsen¹ gave a decisive critique of the "strict positivist" method: "If 'interpretation' is understood as cognitive ascertainment of the meanings of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law to be interpreted represents, and thereby the cognition of several possibilities within the frame; "continuing" jurisprudential interpretation must carefully avoid the fiction that a legal norm admits only of one as the 'correct' interpretation. Traditional jurisprudence uses this fiction to maintain the ideal of security".²

In fact, in legal science as elsewhere, any definition of interpretation is the expression of a very general philosophy. In presenting his method of interpretation, a person dealing with law first brings out into the open not only his explicit postulates, but also and above all his implicit ones, which are the foundations of his conception of law. Interpretation, the heart and the life of the law, is the central aspect on the basis of which authors recognize and oppose each other. Two recently published works of legal theory provide an excellent illustration. A. Aarnio,³ calling for an approach of the hermeneutic type, says: "a central task for legal dogmatics is the justification

¹ H. Kelsen, *Pure Theory of Law*, University of California Press, 1967, trans., 2nd. ed. 1960, p. 381.

² H. Kelsen, *op. cit.*, p. 356.

³ A. Aarnio, *The Rational as Reasonable, A Treatise on Legal Justification*, D. Reidel Publishing Company, 1987, p. 67 ff. Also, *Argumentation Theory and Beyond*, *Rechtstheorie* 1983, p. 385 ff.

of norm standpoints ... Interpretation in turn has been understood as a linguistic matter ... From a procedural point of view, however, the nature of the interpretive process is not problematic. It is a question of how a justified interpretation of a rationally acceptable meaning content is produced. How can we render believable that a certain meaning content is rationally justified and right?" And R. Dworkin⁴ states the problem that in his view makes interpretation necessary: "We live in and by law ... How can the law command when the law books are silent or unclear or ambiguous?" These two different approaches to interpretation will reflect two strongly opposed philosophies of law.⁵

The fact that all interpretation is located within a philosophy that guides and determines it⁶ is certainly not peculiar to legal science but true of all disciplines in both the social and the natural sciences. A. Aarnio, in order to propose a theory of change and progress in legal science, centres his ideas around interpretation, referring to the work of Thomas Kuhn⁷: "What obviously Kuhn intended by talking about revolutions as paradigm shifts was that interpretation of the basic matrix of a given field may change and in fact does change." He concludes by citing Kuhn himself: "Its (the paradigm's) assimilation requires the reconstruction of prior theory and the re-evaluation of prior fact, an intrinsically revolutionary process".⁸ Aarnio's approach seems to us to be thoroughly well-founded; Kuhn's ideas indeed apply equally well to other disciplines. Demolombe, master of the so-called exegetic method,

⁴ R. Dworkin, *Law's Empire*, Fontana Press, 1986, preface VII.

⁵ R. Dworkin, "Le positivisme", *Revue de Droit et Société*, LGDJ no. 1, 1985, p. 36. "I wish to attack positivism in general, taking as my target Hart's version ... I shall maintain that positivism is a model of and a system of rules and that the central idea in that doctrine, that there is some single, fundamental test of law, stops us seeing the important role of standards which are not rules."

⁶ See also *Archives de philosophie du droit* n. 17, "L'interprétation dans le droit", Sirey, 1972. In particular H. Batiffol, "Questions de l'interprétation juridique", p. 10 ff.. See also M. Villey, "Méthodes classiques d'interprétation du droit", p. 85 ff., and M. Sbriccoli, "Politique et interprétation juridique dans les villes italiennes du Moyen-Age", p. 101 ff. and Ph.I André Vincent, "L'abstrait et le concret dans l'interprétation", p. 135 ff.

⁷ A. Aarnio, *Paradigms in Legal Dogmatics. Towards a theory of change and progress in legal science, in legal theory and philosophy of science*, Lund, Sweden, ed. by A. Peczenick, Lars Lindahl, B. van Roermund, D. Reidel Publishing Company, 1984.

⁸ T. Kuhn, "Structure of Scientific Revolutions", p. 7 in A. Aarnio, *op. cit.*

said: "in theory, interpretation is the explanation of the law; interpreting is elucidating the true, precise meaning of the law. It is not changing, modifying or innovating; it is declaring, recognizing. Interpretation may be more or less ingenious and subtle: it may sometimes give the legislator intentions he did not have ... better ones or less good ones, but at the end, it is essential for there to be no claim to have invented; otherwise, it would no longer be interpretation".⁹ Proposing a new interpretation means completely redefining the area considered. To the argument from the completeness of the legal world posited by exegesis in its method of interpretation, Gény raised objections, through his method of interpretation, known as "free scientific research": "the legal interpreter finds his proper field only in the moral, social, economic milieu ... the atmosphere of the legal world. Interpretation in private law applies in two quite different series of cases: the interpreter is in the presence of formal sources of law which, by imposing themselves on him, suppress or restrain his freedom of judgement. In the absence of any formal support, the interpreter is more completely left to the inspiration of his individual consciousness ... What has to be done is to pick out, from the common basis of the nature of things, objective rules which will guide that awareness and guarantee it against the subjectivism of its judgements."¹⁰

As we see, the question of interpretation touches the very nature of law; it seizes the law in its very moment of creation.¹¹ We shall seek to analyse

⁹ Demolombe in L. Husson, "Analyse critique de la méthode de l'exégèse", *Archives de philosophie du droit* no. 17, Sirey, 1972, p. 119.

¹⁰ F. Gény, "Méthode d'interprétation et sources en droit privé positif", *LGDJ*, 1932, 2nd edition, p. 220.

¹¹ From 1979 to 1986 the University of Macerata has annually held conferences on the act of interpretation and the creative element it incorporates. By way of example, let us mention:

a) Atti del I Colloquio sulla interpretazione, Macerata, 19-20 April 1979 - edited by G. Galli, *Interpretazione e contesto*. In particular: G. Galli, "Interpretazione come argomentazione nella esperienza giuridica intermedia", p. 47 ff.

G. Crifo, "Interpretazione giuridica di testi non giuridici" (Esemplificata con un aspetto dei rapporti tra Cicerone e il diritto romano), p. 64 ff.

b) Atti del III Colloquio sulla interpretazione, Macerata, 6-7 April 1981 - edited by G. Galli, *Interpretazione e valori*. In particular G. Ferretti, "Interpretazione e valori: appunti per una teoria generale", p. 180 ff.

c) Atti del IV Colloquio sulla interpretazione, Macerata, 29-30 March 1982 - edited by G. Galli, *Interpretazione e dialogo*. In particular, R. Bertalot, "Interpretazione e dialogo nell'esperienza giuridica", p. 23 ff.

this interpretive process starting from the idea of *coherence*, and our thoughts will go on to consider what is traditionally called the foundations of legal argumentation. We shall thus enquire after the nature of legal rationality. Let us however make it clear that we propose to allow our hypothesis only a heuristic value. The object of our investigation is legal argumentation in general, without forgetting that the various fields of law, its various disciplines, do not systematically use the same legal techniques for their argumentation. For this reason, the production of a model is a necessary, but insufficient, first stage towards a full understanding of legal argumentation. The model would have to be tried out experimentally on various legal fields, its limitations picked out, and this we shall not do here. We shall merely, in working out these ideas, posit the hypothesis of coherence as the principle of rationality of legal argumentation (II), and then, in a hermeneutic procedure, go on to enquire as to the very nature of this coherence (III). Before that, however, we shall have to do some thinking about the concept of law (I).

What is it that is being interpreted in legal science? The idea currently accepted by legal practitioners interpreting the law is that interpretation relates to entities prior to all legal activity, which are imposed on all such practitioners: legal norms. These are posited as preconstructed and antecedent to any research (whether for identifying or for interpreting the rule); the rule, "the norm", is the *starting-point* for thinking on what the law "says". The rule speaks to us; interpretation consists in understanding what it is saying to us.¹² Contrary to this conception, we shall say that *the legal rule, far from being a starting-point, is a result: and specifically, that of the activities, in the broad sense, of the interpreter.*¹³

d) Atti del VII Colloquio sulla interpretazione, Macerata, 25-27 March 1985 - edited by G. Galli, *Interpretazione ed epistemologia*. In particular:

G. Galli, "Approccio sistemico allo studio dell'interpretazione testuale", p. 10 ff.

L. Mengoni, "Ermeneutica e dogmatica nella scienza giuridica", p. 101 ff.

F. Barone, "Teoria e osservazione nel dibattito epistemologico", p. 147 ff. (this text offers an extremely interesting conspectus of the history of the philosophy of science in connection with the concept of "fact").

¹² See for instance P. Amselk, *Théorie des actes de langage, Ethique et droit*, P.U.F. 1986 (edited by P. Amselk), p. 109 ff. Likewise, M. Van de Kerchove, "La théorie des actes de langage et la théorie de l'interprétation juridique", in *Théorie des actes de langage, Ethique et droit*, *op. cit.*, p. 211 ff.

¹³ Every legal practitioner, ceaselessly asserting that "a bad settlement is worth more than a good trial" and thereby reflecting the uncertainty of the verdict in any legal proceedings, ought readily to accept this postulate! This definition also allows us to avoid the very

Interpretation in legal science is always the attribution of a meaning to a document, or to a set of documents, which is (are) regarded as expressing a legal "norm". The conception of law according to which the norm is the starting-point for thinking about what the law says posits that interpretation refers to the set of all activities and all results relating to the learning and utilization of law in force, with, let us note, a very objective conception of law. But this is not only what interpretation is. It is more than the set of activities of learning the law, including the attribution of meaning to legislative documents. For instance, among legal practitioners (other practitioners may have other *a priori*), the dominating belief is the idea that social relationships are structured by the laws¹⁴ – that all of them theoretically ought to be so – and this belief is founded upon their adherence to a mode of conceiving the law in which "objective law" is complete, systematic (or at least, if the laws have "lacunae", the law as a system must be complete and respond to every "social demand"). In doing so, these practitioners stick to special techniques of extension, integration and manipulation of the laws, which would not be conceivable without this conception, without this set of beliefs. We can see, then, on the basis of this very simple example, *that the laws are accompanied by certain extra-legislative factors of production of law*. Let us note in this connection that the definition of law, very widespread today, as a "system of norms" should be rejected for two reasons: on the one hand, law is much more than a system of norms, and on the other, the rule is not a postulate given us at the outset, but a result (that of the interpreter's activity). By defining the law as a "system of norms" one is in fact entering a complete blind alley as to what the law might be. The extra-legislative factors of production of law to which we have alluded are historical factors *which determine the very meaning of the statements* presented as techniques. A statement, however technical it may be, according to the historical periods considered, may cover very different meanings; let us, for example, recall the famous rule "in claris non fit interpretatio."¹⁵ Sociologically, the rule "in claris non fit interpretatio"

burdensome argumentation, to be found in Austin, Hart and their ilk, about "open textured" rules of law and the resulting conception of the discretionary powers of judges.

¹⁴ Which are, or should be "clear". Where the texts of laws are not clear, the judge would exercise discretionary powers; cf. Van de Kerchove, *op. cit.*, p. 224 ff. Also R. Dworkin, "Le positivisme", *op. cit.*, pp. 42-43.

¹⁵ G. Tarello, *Trattato di diritto civile e commerciale*, I vol. 2, "L'interpretazione della legge", Milan, Giuffrè, 1980, reminds us that in the whole of the early modern period - the 16th to 18th centuries - interpretation was the outcome of the activity of *commentaries* by

claims to be drawn from the idea that a number of decisions relate to a reality that is repeatedly manifested in the same way, thereby authorizing a typical form of judicial decision and expressing the state of the law. From this automaticity of the argumentation carried out, from this idea of a reality that repeats itself identically, we do have to accept the obvious idea that, for reasons of efficiency, the rule has to have a clear meaning: namely, the one which will allow an always identical solution to be given to repeated conflictual situations. The more the judge's argumentation is stereotyped, the more his decisions are systematic, the more the idea that the text being applied is clear will emerge. In other words, from the result of a piece of legal argumentation, an argument of a hermeneutic nature may be deduced (because the text is clear, the judge has no difficulty in applying the text to reality), but in the opposite direction. This inversion in fact corresponds to the concealment of what Tarello¹⁶ called "interpretation as activity" – i.e. the activity of the person doing the interpreting – by "interpretation as product", the result secured by the interpreter. The former is the object of legal discourses about persuasion (for instance, the idea that there can be a "proper interpretation" of a text), while the second is the object of legal discourses of the descriptive type. Insisting on the latter and obscuring the former has the advantage of accentuating the staticism of the legal discourse.

doctors and the activity of *decisions* of courts. Interpretation was recognized as having the value of law, but only for all questions not directly organized by the "lex" at that time constituted by the body of Roman Law and enactments of sovereigns. This principle was thus a *principle of hierarchy of sources*, which ruled out recourse to the right of *interpretatio* in cases directly dealt with by *lex*. It expressed a form of organization of power between the central power and the kingdom. Following the Napoleonic codification and the creation of the Nation State, *interpretatio* no longer had value as a source of law and took on the meaning we know today: *attribution of meaning to legislative documents*. From a principle of legal organization, this principle became a principle of statement of law. Power was no longer structured in the same way; the principles of separation of power and sovereignty of the legislature were aimed at confining the judiciary in a subordinate role: a judge should never (and never shall) create law. Exegesis stated that "in claris non fit interpretatio" means that the text has its own meaning sufficient to itself, and accordingly laid down a number of techniques of interpretation. So-called declarative interpretation (whether restrictive, "interpretation *a contrario*", or extensive, "interpretation by analogy") suggests that the legislative discourse has a principal meaning of its own independent of the person implementing it. When the method of exegesis was falling into decline, which corresponds to the time of transition from the liberal State to the social State, the interpretations known as creative and abrogative appeared.

¹⁶ G. Tarello, *op. cit.*

It is however true that the positive method that brings to bear this principle “in claris non fit interpretatio”, though it leads to the result of the interpretation being placed in the foreground, does also, and quite clearly, deal with interpretation as activity. However, this method maintains the inverse relationship that we pointed out earlier: the difficulty of arriving at a stable, constant interpretive result for a whole set of decisions, deriving from the fact that a text is not clear, is ambiguous or has lacunae. The conception we have of law once again determines the technical apparatus we shall be induced to employ. There is a regrettable abuse of interpretation in legal science, or in E. di Robilant's felicitous expression, legal culture no longer distinguishes between science and technology.¹⁷ It is clearly not among our intentions to deny the obvious truth that there may be ambiguity in the usual meanings of the terms that a legal statement may contain. Some expressions will, for instance, have a purely legal meaning, and others will have a common meaning. Nor does common language supply a single meaning for each term. And we likewise know that a term will have a meaning that will vary on a historical scale. The possibility of giving a single expression multiplicitous and sometimes new meanings, of having recourse to metaphors, is bound up with the conditions of use of natural language, and thus does not favour jurisprudential uniformity: “the fact that natural language often has recourse to confused notions that give rise to multiple interpretations, to varied definitions, very often compels us to make choices, decisions, that do not necessarily coincide. Hence, very often the obligation to justify these choices, to motivate the decisions”.¹⁸ But even if all this is true, that does not compel us to retain the analysis of interpretation as activity at the level of classical philology. Moreover, contemporary hermeneutics condemns this approach; a part of the text can be understood only in relation to the whole of the text, just as, moreover, the

¹⁷ E. di Robilant, “Prospettive sul ruolo del giurista nella società tecnologica della nuova Europa”. *Materiali per una storia della cultura giuridica*, December 1980, no. 2, p. 509 ff: “Riservare la denominazione ‘scienza giuridica’ ai tentativi di rappresentare, ridurre a unità e spiegare i fenomeni che vengono indicati generalmente come diritto; vale a dire a quell’attività prettamente conoscitiva, diretta a produrre teorie ... viene indicata come scienza. Tecnologia: l’attività rivolta a chiarire che cosa si debba fare qualora si vogliano ottenere determinati risultati all’interno dell’ordinamento giuridico” (p. 510). Likewise, L. “Ferrajoli, La formazione e l’uso dei concetti nella scienza giuridica e nell’applicazione della legge”. *Materiali per una storia della cultura giuridica*, Volume XV - no. 2, December 1985, p. 403 ff.

¹⁸ C. Perelman, “Logique formelle et logique informelle” in *De la métaphysique à la rhétorique*, ed. M. Mayer, 1986, Edition de l’Université de Bruxelles, p. 17.

latter cannot itself be understood except on the basis of its various constitutive elements.¹⁹ How, then, are we to break out of what is called the "hermeneutic circle"? We shall return to this question in the last part, with our hypothesis of narrative coherence as the basis of legal argumentation. First of all, however, we must make this notion of "interpretation as activity" somewhat clearer.

At the beginning of this text we posited that the legal rule, far from being a starting-point for interpretive argumentation, was a result, an end-point. From this conception of the rule of law we shall now pick out the idea that *law is an interpretive concept*. Jacques Ellul told us one day that in all the works he had devoted to law, he had never been able to keep the same definition, never been able to get to the "centre" of law. More than expressing to us the difficulty that anyone might have in defining law in a few words, Jacques Ellul was implicitly enunciating a legal culture. Conceiving (or seeking, which in this case is synonymous) "the law" on the basis of the idea of a "centre", in other words starting from the idea that there are a few elements that constitute its fundamental substance, the origin of all law, is a conception, an interpretive hypothesis, that has emerged from a *culture* of classical natural law. This culture posits the law as something given *a priori* to individuals living in society, which has then to be found. The law does not, however, take form around some hard core of immutable principles that have to be found in order finally to give law coherence (from which the idea of justice would emerge). Law is part of the whole set of practices that lay claim to it; it is the set of practices that gives legal existence to statements termed general or fundamental principles. The law must be perceived on the basis of an analysis of actual practices and on the basis of finding its range of sources, a method which, following Foucault's work, may be called "archaeology". The set of definitions that Jacques Ellul was able to give of law are all of them elements belonging to the investigation of this method.

Legal argumentation is argumentation of an interpretive kind; law is interpretation. What is the nature of this operation of interpretation? In positing that the law is something preconstructed, antecedent to any intellectual operation, the various positivisms (in the period of exegesis or at the present

¹⁹ "I ask the reader to accept, with Benveniste and Jakobson, Austin and Searle, that the primary unit of meaning in discourse is not the sign in the lexical form of the word, but the sentence, i.e. a complex unit linking a predicate to a logical subject, or using P. Strawson's categories, joining an act of characterization by predicate and an act of identification by position of the subject." P. Ricœur, "Rhétorique, Poétique, Herméneutique", in M. Mayer, *op. cit.* p. 143.

day) have been brought to state that the operation of interpretation (what we called above interpretation as activity) aims at "discovering" this preconstructed thing, at "discovering" the law.²⁰ We however say that the legal practitioner is discovering nothing, since we reject the hypothesis of the legal rule as something preconstructed. Nor is the object of his activity "norms" either, but quite simply statements. The attribution of meaning to a statement²¹ may consist sometimes in an act of will, sometimes in an act of cognition. An act of will because the practitioner of the interpretation may *decide* to attribute to the document being interpreted (and there is no document that does not have to be interpreted) a particular meaning (the judge, say); of will, likewise, because the practitioner may *propose* (as does, for instance, doctrine) a meaning for the statement. Of cognition, because the practitioner may *find that in the past* such and such a particular meaning has been given to a document,²² just as he may claim to *foresee* the meaning which will be given to a document in the future. These operations, thus reflecting what we have called interpretation as activity, may perfectly well be combined:²³ the operation of will combined with the operation of cognition constitutes the legal argumentation whereby a precedent, for "common law", or jurisprudence, for a "codified" law, is created.

The least inexact expression at this stage of our thinking to describe the operation of interpretation would then be: the interpreter finds (as far as concerns the past, whether remote or recent) *or* decides, *or* proposes, the meaning to be attributed to a document, made up of one or several statements, the meaning of which is not preconstituted when the interpreter comes to act, but is his product. Before the interpreter's activity of interpretation, the only thing that may be said is that the document being interpreted expresses one or more "norms", and when we say "norms", we mean only the meaning that

²⁰ For instance: "following the text, step by step, may flatter himself at thus more easily discovering the thought of the legislator", Demolombe, *Cours de Code Napoléon*, préface, p. VI; see also Geny, who, opposing this method, said: "the legislator's thinking is not enough in itself to *reveal* (our emphasis) the solution sought for", Geny, *op. cit.*, p. 127.

²¹ G. Tarello, *op. cit.*, p. 89

²² In the last part of this article we shall return to the question. We may nevertheless say here that the historian's *method*, or the legal historian's specifically, will not be seen by us as different from the jurist's.

²³ We shall see that they always are, and try to say why and how.

has been given or been decided to be given or been proposed to be given to a document.

Under what type of logic, then, does interpretive argumentation following the definition that we give the operation of interpretation fall? Informal logic that allows a controversy to be decided occupies, we feel, a preponderant place. Formal logic can be only a part of legal argumentation. Interpretive argumentation is a persuasive discourse; no rule may claim to escape controversy, since the starting-point for any argument, or any argumentation, has to be accepted by the hearer who is to be persuaded or convinced. Thus, a deductive process, before coming into operation, cannot do without rules of acceptability, and these rules can be established only by an argumentative procedure. The discovery of truth is never completely analytical. However, it must also be accepted that deductive logic does constitute the form of any valid argumentation. Thus, when it comes to thinking what type of rationality applies in the operation of interpretation, the question that should be asked is what common roots there may be between deductive logic and argumentation. It is not a case of opposing one to the other, but of understanding what they jointly express. "The guiding thread that allows us to understand both the role of logic and that of argumentation is the idea of 'logos'. The 'logos' is a measure which is in things ... There is speech that recounts, *but* (our emphasis) there is speech that seeks to say what is in truth".²⁴ Let us now come to the hypothesis of coherence as the rationality principle of legal argumentation; we shall see that there is not necessarily an opposition between account and reality.

II

In his paper to the Lund conference, Neil MacCormick went through some ideas on "coherence in legal justification",²⁵ with the object of clarifying the elusive notion of coherence ("making sense").²⁶ He defined this as "a com-

²⁴ J. Ladrière, "Logique et argumentation", in M. Meyer, *op. cit.*, p. 24 ff.

²⁵ N. MacCormick, "Coherence in Legal Justification", in *Theory of Legal Science, Proceedings of the conference in legal theory and philosophy of science*, Lund, Sweden, December 1983, Ed. by Peczenik, Lars Lindahl, B. van Roermund, D. Reidel Publishing Company, Dordrecht, 1984.

²⁶ See also, Barabara Baum Levenbock, "The Role of Coherence in Legal Reasoning", *Law and Philosophy* (An international journal for jurisprudence and legal philosophy), Volume 3 no. 1, 1984, p. 355 ff.

mon subservience by a set of laws to a relevant value or values",²⁷ going on to distinguish between two cases which he called "normative coherence" and "narrative coherence" respectively. Since, says MacCormick, justification has two types of application, one dealing with argumentation on questions of law and another that infers evidentiary facts, two types of coherence should be distinguished. The coherence of norms refers to the attribution to them of meaning when they are rationally linked into a set in order to arrive either at some common value or some common principle. The coherence of a set of norms would then be a function of its justifiability on the principles or values of a higher order.²⁸ However, by contrast with R. Dworkin,²⁹ for MacCormick coherence in the act of justification does not presuppose any unity of the world of law (the law taken as a whole), but merely refers to common questions taken in a particular area of law.³⁰ The notion of coherence defined in this way is derived from the various materials existing within the branch of law considered, but also from a construction aimed at establishing a coherent view of this branch of law. The example given by MacCormick is that of the interpretation of a statute, where the rhetoric of this justification will consist in presenting the statute on the basis of the idea that it is the legislator's intention to legislate coherently.³¹ With the problem put in this way, the question then amounts, in the author's eyes, to asking whether coherence is a quality that legal norms ought to show, and if so, why? His reply is that coherence determines merely a rather weak derivability from the argumentation (or decision) that emerges from the established law, since coherence is a desired, but solely ideal, feature of a legal system. We shall dispute this opinion;³² for the moment, however, let us continue with the author's conception of narrative coherence. This is the name given to the test of truth or likelihood of questions of facts and evidence, for which *direct*

²⁷ "A common subservience by a set of laws to a relevant value or values", N. MacCormick, *op. cit.*, p. 237.

²⁸ N. MacCormick, *op. cit.*, p. 238.

²⁹ Part II below.

³⁰ In MacCormick, the natural-law hypothesis is always very clearly stated.

³¹ N. MacCormick, *op. cit.*, p. 242.

³² The definition we have given of law - an interpretive concept - condemns us to this in any case.

proof on the basis of immediate observation is not possible. This definition, and the very terms the author uses, will be of cardinal importance, because the definition will be absolutely central when we posit the hypothesis of narrative coherence. MacCormick himself says: "Since almost every legal dispute concerns facts or events in the past, and since neither the facts nor the events are capable of direct proof through immediate observation, narrative coherence is a test of great, indeed central, importance in the justification of a legal decision".³³

Nature is understood on the basis of explanatory principles "laws of nature" of the *causal* or *probabilistic* type; society too is understood on the basis of explanatory principles of a rational, intentional and psychological nature, likewise of *causal* or *probabilistic* type. We share with MacCormick³⁴ the idea that the principle of causality holds in both the natural and the social sciences. And if narrative coherence has genuine persuasive force in arriving at decisions on questions of fact, this is because of the role played by the idea we have of rationality. We shape the world in which we live to be a world intelligible to our minds. One of the conditions of intelligibility is the assumption that what we perceive is reality.³⁵ Another is that, whatever it may be, reality is rationally related to explanatory principles of reality that are to be discovered. Thus, "all propositions relating to unperceived events adopted into our explanatory scheme in rational fashion along with true propositions relating to observed events are true propositions relating to the reality of unobserved events".³⁶ This observation is important, since it is in fact through these conditions of intelligibility that we are able to speak about the truth of things: formal logic and informal logic are inextricably mixed; they must form a coherence, which is the creation of reality.

Though we are in complete agreement with the conception developed by MacCormick of narrative coherence, we have some difficulty with the conception he puts forward of normative coherence. Firstly, do these two types of coherence have something in common? For MacCormick, the question is whether or not there is a parallelism between the coherence that justifies conclusions of a normative nature and the coherence that justifies

³³ N. MacCormick, *op. cit.*, p. 245.

³⁴ We shall soon see the rejection of this kind of idea by R. Dworkin.

³⁵ N. MacCormick, *op. cit.*, p. 245.

³⁶ *Ibidem.*

factual conclusions. His answer is yes, because we cannot lay claim to a rational normative order if we do not conjointly have a rational world-view. On this we agree with him; but in relation to the question that concerns us, the type of rationality at work in the operation of interpretation, our problem is posed in different terms. It is based on the very existence of this parallelism: what are the links between these two types of coherence in the course of the interpretive process? Or again, in that process, is it possible to distinguish between these two types of coherence? We do not think so, and this is the question that shall now guide our thoughts.

R. Dworkin's latest work³⁷ may prove very valuable here. We have in common with him the definition of law as an interpretive concept³⁸ – a definition which, by the way, cannot be *a priori* understood as linked with contemporary positivisms or naturalisms³⁹ – and our study relates to the same aspect of legal interpretation, argumentation itself, and not to the result of the latter.⁴⁰ Moreover, the distinction drawn by MacCormick between coherence of normative and of narrative type does not appear in Dworkin's work, a fact that may be promising for the solution of our problem.

The question presented by Dworkin as central, right from the preface, is how the law commands when what constitutes the whole set of legal data is silent, unclear or ambiguous. To clarify the hypothesis on the basis of which an answer might be put forward, he defines what in his view is the nature of legal argumentation: a constructive interpretation. Our laws consist

³⁷ R. Dworkin, *Law's Empire*, Fontana press, 1986.

³⁸ For instance, *Law's Empire*, p. 87 "law is an interpretive concept. Judges normally recognize a duty to continue rather than discard the practice they have joined. So they develop, in response to their conviction and instincts, working theories about interpretation of their responsibilities under that practice. When they disagree in what I called the theoretical way, their disagreements are interpretive". Or again, p. 139 "a conception of law is a general abstract interpretation of legal practice as a whole". See also, *A Matter of Principle*, a collection of texts that systematically deals with law as an interpretive concept, e.g.: "Is there really no right answer in hard cases?", "How law is like literature", "On interpretation and objectivity".

³⁹ See the presentation of Dworkin given by M. Troper in *Droit et Société*, no. 1, p. 27 ff.

⁴⁰ R. Dworkin, *Law's Empire*, *op. cit.*, p.13: "This crucial argumentative aspect of legal practice can be studied in two ways from two points of view. External: sociologist or historian. Internal: of those who make the claim. Their interest is not finally historical ... They do not want predictions of the legal claims they will make but arguments about which of their claims is sound and why." p. 14 "This book takes up the internal..."

in the best justification of our legal practices understood as a totality; this justification consists in a history of narrative type that constitutes these practices in the best possible way.⁴¹ We here find the three main lines of Dworkin's theory: *constructive* interpretation, the law as a *whole*, and *narrativity* of any justification of what law is.

This last notion, however, calls for clarification. Are MacCormick and Dworkin, for instance, speaking about the same thing when they speak of "narrativity"? It may be doubted. For the Anglo-American author legal procedures are at the origin of three different types of question: those of fact and of law, and those that bring in political morality and "fidelity".⁴² The first and third type of question, he says, do not raise special problems; for him, the second alone is the origin of all legal problems. Jurists and judges very frequently seem to differ as to the law applicable to cases presented; they even seem to differ over precisely what rule they ought to apply.⁴³ The problem raised by MacCormick, which is quite central for us, concerned with the concept of narrative coherence, accordingly does not appear in Dworkin, even when he presents his perception of the interpretive process. Though he uses the term narrative coherence, Dworkin's notion of coherence seems to us to be linked more with a question of normative than of narrative type, in the sense the Scottish philosopher suggests: law – which Dworkin posits as complete – presupposes an interpretation of interpretation.⁴⁴ When he says: "an interpretation aims to show what is interpreted in the best light possible, and an interpretation of any part of our law must therefore attend not only to the substance of the decisions made by the earlier officials but also to how – by which officials in which circumstances – these decisions were made",⁴⁵

⁴¹ *Law's Empire*, *op. cit.*, preface.

⁴² *Law's Empire*, *op. cit.*, p. 3

⁴³ For Dworkin, this conflict is "a theoretical disagreement".

⁴⁴ For instance, *Law's Empire*, p. 19 "since a statute forms part of a larger intellectual system - the law as a whole - it should be constructed so as to make that larger system coherent in principle", also p. 243 "law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process". This passage does seem to authorize the linkage we make between this author and MacCormick, and indeed the terms used by both are sometimes even identical

⁴⁵ *Law's Empire*, *op. cit.*, p. 243.

Dworkin has in mind not a so-called question of fact, but a question of casuistic type: specific and general circumstances will help us to determine *what type of principle* has been affirmed through this particular decision. This is a question of principle in a very "Dworkinian" sense of the term.⁴⁶ The dogma of the coherence of law is bound up with the idea that for any legal system there is only one ethics, one political doctrine, that constitutes the foundation and justification for the law. The notion of coherence is to be evaluated on the basis of the "principles" and the "completeness" of law; in this sense it is, in our view, a normative notion. For Dworkin, the point is how to discover the general, ethical, principle that governs the sound interpretation of a legal datum, in order to construct the legal meaning that lies *behind* this legal datum.

In Dworkin we never find any thinking about how reality is described, or defined, during an operation of interpretation.⁴⁷ It is also true for him, however, that interpretation is not the operation whereby hard, unequivocal facts are discovered either. The question of "fact" is quite simply not perceived as a problem; no more, no less.⁴⁸ *In Law's Empire*⁴⁹ Dworkin

⁴⁶ The way the rule of politeness is presented (*Law's Empire*, p. 47) is characteristic of this: "people now try to impose meaning on the institution - to see it in its best light - and then to restructure it in the light of that meaning. The two components of the interpretive attitude are independent of one another".

⁴⁷ In, Is there really no right answer in hard cases?, in *A Matter of Principle*, *op. cit.*, p. 135, R. Dworkin says: "law is an enterprise such that propositions of law do not describe the real world in the way ordinary propositions do, but rather are propositions whose assertion is warranted by ground rules like those in the literary exercise". We shall return at greater length to the epistemology underlying this conception; let us merely note, as it were by way of prelude, on the one hand the existence in this author of "hard facts", and on the other the absence of questions about their existence, even in the very operation of interpretation. For instance, in the same article, p. 137, we find: "... the demonstrability thesis: this thesis states that if a proposition cannot be demonstrated to be true, after all the hard facts that might be relevant to its truth are either known or stipulated, then it cannot be true. By "hard facts" I mean physical facts and facts about behaviour (including the thought, and attitudes) of people..."

⁴⁸ This point nevertheless remains rather confused in Dworkin. If not evolution of his thought, there has in any case at least been qualification, renewal and subsequent retouching. Indeed, he seems to circle the question of the construction of facts without ever wishing to deal with it, with sometimes a few assumptions that are adventurous by comparison with his theoretical foundation: "Someone might say that my position is the deepest possible form of scepticism about morality, art, and interpretation because I am actually saying that moral or aesthetic or interpretive judgements cannot possibly describe an independent objective reality. But that is not what I said. I said that the question of what

says: "Legal philosophers cannot expose the common criteria or ground rules lawyers follow for *pinning*⁵⁰ legal labels onto facts ... " Here he is no doubt sticking to what MacCormick regarded as the first condition of intelligibility for understanding our world: true propositions relating to perceived events are true propositions about reality itself.

Since he defined law as an interpretive concept, Dworkin has to give a definition of interpretation, and this operation shows what his theoretical foundation is. Interpretation in legal science is, he tells us, similar to artistic interpretation⁵¹; both aim at interpreting something created by individuals; this is an entity distinct from them, which is not the case for interpretation of a dialogue or interpretation of the scientific type. The difference has here to do with the fact that the two latter types of interpretation do not interpret something created by individuals. Artistic interpretation and interpretation of social practice, such as law, are called by Dworkin creative interpretation, in order to distinguish them from interpretation of a dialogue or from scientific interpretation.⁵² The interpretation of a dialogue pursues a goal, an objective, and is not truly causal "in the mechanical sense of the term". It does not claim to explain the foundations of someone's act, says Dworkin, in the same way as a biologist explains "the croaking of a frog".⁵³ Meaning is as-

'independence' and 'reality' are, for any practice, is a question within that practice..." "On Interpretation and Objectivity", in *A Matter of Principle*, *op. cit.*, p. 175.

The question we might ask him would be: what does this "within" that practice mean? Dworkin does, to boot, seem to withdraw somewhat in "La théorie du droit comme interprétation", *Revue Droit et Société*, LGDJ 1985, no. 1, p. 87. There he tells us first that "interpretation is an activity consisting in seeking to impose coherence on the conduct constituted by a piece of social practice, and imposing coherence means proposing a coherent explanation or meaning of which that conduct may be regarded as an expression or an example". We can follow the author so far, but where we no longer can is when he tells us the way an explanation (or coherent meaning) is proposed: "Very often, facts determine only part of an explanation. An interpreter needs criteria in order to choose among the various interpretations *allowed by the hard facts of the piece of conduct*" (*ibid*; our emphasis). But the hard facts of conduct do not have meaning in themselves.

⁴⁹ *Law's Empire*, *op. cit.*, p. 90.

⁵⁰ Our emphasis.

⁵¹ *Law's Empire*, *op. cit.*, p. 50.

⁵² *Law's Empire*, *ibid*.

⁵³ *Law's Empire*, *ibid*.

signed on the basis of the motives, goals and objectives that an interlocutor is supposed to have, and this interpretation arrives at its conclusions as statements relating to the interlocutor's intention, by saying what he says. For Dworkin, all interpretation aims at explanations that satisfy goals and objectives, and these objectives distinguish this interpretation from interpretation of the more generally causal type. He says in this connection that scientific interpretation is not really interpretation: this is a metaphor, as if facts were speaking to the scientist in the way one person speaks to another. The scientist is represented as endeavouring to understand what the fact is trying to tell him; the metaphor disappears if we remove the idea of intention. Dworkin extends this definition of interpretation to creative interpretation, asking whether this too is interpretation only metaphorically. Here we might say, again according to Dworkin, that when we think of interpreting poems or social practices we imagine them speaking to us, telling us something, as does a person talking to us.⁵⁴ The problem is that in this case it is hard to get rid of the metaphor, since, *for this type of interpretation, it is intentions more than authentic causes that are at work*. Accordingly, we must find a way of replacing the metaphor of social practices or works of art speaking to us in their own words by a metaphor that nevertheless recognizes the fundamental place of intention in creative interpretation. The author sees this possibility in a conception of creative interpretation that is not of conversational type but of *constructive* type, *characterized by intentions and not by causes*.⁵⁵ Firstly, the intention will not be the author's, but the interpreter's; secondly, constructive interpretation consists in imposing goals on an object or a practice, in order to present it as the best possible example of the form or meaning that it expresses; thirdly, the history of this practice puts constraints on what interpretations are available.⁵⁶ Constructive interpretation is an interaction among intentions, objectives and objects. Thus, says Dworkin, someone interpreting a social practice puts forward values for it by describing models of either interest, goals or principles that this practice may serve, express or exemplify. But in return, the material aspect of

⁵⁴ We also find this metaphor, let us recall, in legal interpretation as defended by positive methods, where the point is to discover what the rules of law are "telling" us. See also p. 5 above.

⁵⁵ *Law's Empire*, *op. cit.*, p. 51.

⁵⁶ *Law's Empire*, *op. cit.*, p. 52. We shall return to this point. Let us note here that we accept the first point, but shall deal with the third differently.

this practice – raw behavioural data, i.e. what people do in such circumstances – sub-determines the assignment of value. This is the way that Dworkin posits the relationship between the meaning one gives a text and the (constructed?) reality that corresponds to it. Let us once again note what we said earlier on the notion of reality and the question of fact:⁵⁷ knowledge of reality is not a question that concerns Dworkin. But this bears on the definition of interpretation put forward. He talks about “raw behavioural data” as something that sub-determines interpretations, without ever telling us exactly what.⁵⁸ This silence need not surprise us, since no such datum exists. Take the example of politeness, of a man raising his hat: how can we interpret this gesture of a hat being raised if we do not know *beforehand* that the person intends to express politeness?⁵⁹ The man may raise his hat because it is hot, because he is neurotic and full of tics, because he is a legal philosopher in a seminar trying to understand, and explain to his students, the underlying material act that would express a rule of politeness. Quite clearly, in order to exist, a rule of politeness requires some material manifestation. What we dispute is the relationship Dworkin seeks to posit between a rule and a social practice.⁶⁰ Another point we might mention here relates to the notion of interpretation in social and natural science. Basing himself on Dilthey (and on H. G. Gadamer, but he too based himself on Dilthey), Dworkin goes back to the classical difference between the rationality of the natural sciences (causal) and the rationality of the social sciences (let us say non-causal), which allows him to put forward his definition of interpretation

⁵⁷ Notes 47-48

⁵⁸ Or for instance the rule of politeness: by what might one immediately and unmistakably recognize it?

⁵⁹ Here we find the famous hermeneutic circle: “one must end up with a theoretical assumption that it is impossible to pronounce on anything whatever without having a preconceived opinion of it”, Stig. Jorgensen, *Theory of Legal Science*, Lund Conference, *op. cit.*, p. 123. We know Gadamer’s work on the notion of “prior knowledge”.

⁶⁰ Stig Jorgensen reminded us of the parable of the seven sages describing an elephant. This parable shows that “our cognition is fragmentary, delimited by our ability to grasp reality and the instruments we are using in the cognitive process and by the interests which are lying behind. It is obvious that we do not get an answer to questions that we have not yet asked and we get the answers that our instruments are capable of providing.”- Stig Jorgensen, *ibid.*

in legal science. With P. Veyne,⁶¹ we abandon this distinction and say that in both natural and social sciences the explanations we put forward are always of causal type. If in physics we say "the apple falls *because*", in history, for instance, we say "the event happened *because*". Veyne is right to assert, on the other hand, that facts in the physical sciences are general, whereas in history they are only particular. Here a difference between natural sciences and social sciences can indeed be posited. The consequence is that laws in the social sciences with the possible exception of linguistic laws, can never lay claim to the universality of laws of natural science. In rejecting Dworkin's epistemological conceptions, we come to reject the type of relationship he posits between observation and interpretation. Observation without interpretation is nothing; or if you wish, since it comes to the same thing, it may be everything. On the contrary, interpretation, as such, cannot be everything. So we have to posit the relationship between these two notions differently. That a man raises his hat means nothing in itself, or, to say the same thing, it means, as we have seen, whatever you like. But a rule of politeness does not refer to just anything, and would not even be its own history, as Dworkin asserts, restricting imaginative interpretations; this is because after all, in conformity with his first thesis on interpretation;⁶² history refers first of all to the narration of the person recounting it: historical truth in the last instance rests on the way history is told, on the account itself.

Like Dworkin, we posit that law is an interpretive concept whose justification is narrative in nature, but we depart from him when it comes to defining the nature of that narration. To do so, let us go back one last time to MacCormick's work, in particular the book he wrote together with O. Weinberger.⁶³ It affirms, from the introduction onward, that no legal science is conceivable without consideration of social reality⁶⁴ and that the whole question consists in giving an account of precisely that social reality: "legal and other social facts are matters of institutional fact". And these are true not

⁶¹ P. Veyne, *Comment on écrit l'histoire*, suivi de *Foucault révolutionne l'histoire*, Editions du Seuil, Collection Point, 1978.

⁶² Cf. p. 21 and footnote 56.

⁶³ N. MacCormick, O. Weinberger, "The Institutional Theory of Law", *New Approaches to Legal Positivism*, D. Reidel Publishing Company, Dordrecht, 1986.

⁶⁴ N. MacCormick, O. Weinberger, *op. cit.*, p. 7.

merely because of the conditions of the material world and the causal relations that may be posited among the elements making it up. They are true by virtue of an *interpretation of what is happening in the world*, and thus, an interpretation of events in the light of human actions and of norms. The book thus intends to stress the interaction between norms that exist socially and observable features of social life.⁶⁵

Norms and individual actions, or the social order, in their externally observable character, are, according to these authors, two sides of the same coin.⁶⁶ The goal of their research is to reconstruct, through an approach of hermeneutic type, the sphere of the normative rules, goals and values that constitute the basic elements of institutions, while giving an account of the social needs that they satisfy. Citing J. Searle, MacCormick says that a proposition whose truth does not depend essentially on the occurrence of acts or events in the world but also on the application of rules to these acts or events is a proposition of "institutional fact".⁶⁷ *Knowledge of the world of law is also a type of knowledge of the world of facts* (which, let us recall, is not the case in Dworkin), which has to be coherent. MacCormick sees a vicious circle in this model, whereby knowledge about one (or of one) normative action such as law is posited on the basis of the notion of institutional fact which in turn refers to notions ("facts") that result from the interpretation of events by reference to a normative order and as a model of interpretation. Is the circle really vicious? We shall seek to show not, and our reply will be a piece of hermeneutics dealing simultaneously with two types of difficulty: one having to do with the nature of normativity, and the other with the nature of facts ("legal facts"). The hypothesis of narrative coherence as the foundation of legal rationality will come into play here.

III

The task of hermeneutics is to adapt the meaning of a text to the specific situation to which its message is addressed, and it is one of the chief merits of Gadamer's "truth and method"⁶⁸ to have set the problem of application at

⁶⁵ *op. cit.*, p. 20

⁶⁶ *op. cit.*, p. 26

⁶⁷ *op. cit.*, p. 51. See also the distinction drawn by MacCormick among three types of rules, pp. 52-3

⁶⁸ H.G. Gadamer, *Vérité et Méthode*, Seuil, 1976.

the centre of all hermeneutics.⁶⁹ For legal hermeneutics, in fact, what is constitutive is the "tension" that exists between the given text and the meaning its application reaches at the specific instant of interpretation, for instance through a decision in a dispute. Law exists only "by reference to what exists,"⁷⁰ and we shall see that through this reference, every interpretation is creative. On the one hand, interpretation is not a separate act of understanding: *understanding a text already is interpreting it*; interpretation is, in other words, the explicit form of understanding.⁷¹ On the other hand, even within understanding, there comes about something like an application of the text to be understood;⁷² understanding the text adequately in accordance with the text's own ambition already implies the obligation to understand the text in a new and different fashion at every instant, i.e. in every specific situation.⁷³ *Understanding is also already applying.*

Accordingly, interpretation is understanding, which in turn has something to do with application. This is the first point that Gadamer teaches us. But there is a second, of equal importance. Betti thought he was able to distinguish⁷⁴ among three type of interpretation: cognitive, normative and reproductively,⁷⁵ which, as Gadamer pointed out, raised difficulties when it came to allocating the various existing categories of interpretation among these three types. Gadamer said that the "fault line" separating the cognitive function and the normative function runs through the very middle of hermeneutics,⁷⁶

⁶⁹ *Vérité et Méthode*, *op. cit.*, p. 148 ff.

⁷⁰ Ph.I. Andre Vincent, "L'abstrait et le concret dans l'interprétation", *op. cit.*, p. 135.

⁷¹ *Ibid.*

⁷² To the interpreter's present situation, as Gadamer clarifies, *op. cit.*, p. 149

⁷³ The author states that the close interdependence that originally linked philological hermeneutics to legal hermeneutics and theological hermeneutics was based on recognition of application as an integral part of all understanding. For instance, a law would have to have its legal value made specific through interpretation.

⁷⁴ E. Betti, *Teoria Generale dell'interpretazione*, Milano, 2 vols., 1956.

⁷⁵ Artistic too, we might say.

⁷⁶ H.G. Gadamer, *op. cit.*, p. 150. The work surrounding the Betti/Gadamer debate and the former's influence on the latter have been and still are very important, not only on the old continent. See e.g.: "Comparative Normative Hermeneutics: scripture, literature,

and that the gap cannot be filled by distinguishing "scientific" knowledge from subsequent edifying application. This position is unassailable if application becomes a constituent part of interpretation, and accepting this point leads us to abandoning the distinction drawn by MacCormick⁷⁷ between normative coherence and narrative coherence, since this distinction presupposes, once again for the act of interpretation, the prior distinction between cognitive function and normative function. But the assignment of meaning to a legal text and its application to a specific case are not two separate acts, but a unitary process. The distinction drawn by MacCormick accordingly seems to us to be inoperative. Distinguishing a normative function and a cognitive function amounts to completely dismembering what quite clearly has to be a single thing:⁷⁸ the meaning of the law attested in its normative application does not differ in principle from the meaning of the thing asserted in understanding a text. Dworkin is indubitably right in saying that the interpreter must give what he believes to be the best interpretation (for a particular objective) of the document before him. Through legal argumentation, notions (the kind we called extra-legislative at the start of this article) that very often remain implicit are brought into the field of explicitness. To give an account of the existence of these implicit notions, we know that Dworkin based himself on the example of the method in literature, which is perhaps not surprising when we know that what we call the cognitive function of law is not dealt with by him. But this example can no longer be relevant as soon as that question becomes central. What no doubt best characterizes the method in literature is that the account is in no way constrained by reality, whatever idea we may have of it; a position that

constitution", Ronald R. Garst, *Southern California Law Review*, Volume 58: 35 (pp. 37-127), "Interpreting the Law: Hermeneutical and Poststructuralist perspectives", David Couzens HORG, *Southern California Law Review*, Volume 58: 135 (pp. 136-171). It should be noted that the latest work in German legal sociology, particularly that of N. Luhmann and G. Teubner, (*Autopoietic Law: A New Approach to Law and Society*, edited by G. Teubner, W. de Gruyter, Berlin, New York, 1988) seem to rediscover the principle of this distinction. For them, the point is to conceive simultaneously of "normative closure" and "cognitive openness".

⁷⁷ P. 16 ff. above.

⁷⁸ R. Dworkin's work lacks any analysis of the function we call cognitive; which is obviously not without implications for the problem of the "principles" he seeks to discover through the normative order, defined as a narrative coherence. Narrative, because there is an account - but of rules. As against this, we will speak of narrative coherence specifically to describe the unity between the normative function and the cognitive function.

is hard to defend when it comes to understanding a "legal account". The historical method, on the other hand, may prove extremely interesting, if additionally we take up the definition of history worked out by P. Veyne: a true novel.⁷⁹ In the "chain of law,"⁸⁰ the jurist is not solely confronted with the mere coherence of the normative order that he might hope to construct by picking out *principles* that transcend the positive order; he is likewise confronted with the shaping of a reality that comes to act as a perturbatory factor within a coherent conception of the legal order. The image of lawyers as novelists who have successively to continue the story once begun while maintaining and developing its form and spirit seems to us to be right to the extent that, for instance, a set of decisions (or a decision) acts as a reference point for legally arguing a decision to be taken. But this image seems to us at the same time to be insufficient, because these principles, supposedly both the form and the spirit of the work, are not in our view ever the sole outcome of normative-type coherence. The whole of law prior to the decision that, for instance, has to be taken by a judge constitutes a history that has to be interpreted (understood and applied); in it we have decisions that may be innumerable, structures, conventions, practices, etc. Some thinking about historical interpretation therefore seems indispensable to any thinking about legal interpretation. We also know that for a decision in a dispute, but not only there, no direct proof of questions of fact is possible on the basis of immediate observation. The jurist finds himself, in other words, in the position of a historian or, if you will, the historian in that of the jurist. The historical method is therefore a central question: a judge's duty is to interpret legal history,⁸¹ in the sense both that he comes to say either that he is acting as in the past or that he is abandoning the past ("overturning a precedent"), and that his decisions are part of a history that must firstly be interpreted and secondly continued, in conformity with his judgement, so as to be made, in Dworkin's words, the best possible one.

⁷⁹ The definition given of history in P. Veyne's marvellous book *Comment on écrit l'histoire* *op. cit.*

⁸⁰ Taking the term from R. Dworkin, "How Law is like Literature" p. 146 ff. in *A Matter of Principle*, *op. cit.*, *Law's Empire*, *op. cit.*, pp. 228-275.

⁸¹ "And not invent a better one"; R. Dworkin in *How Law is like Literature*, *op. cit.*, p. 160. The idea, which has been constant for centuries, that the judge ought not to "invent" anything whatever is one of the major consequences of the theory of the separation of powers according to which only the legislature is justified in making laws. The application of law ought not, therefore, to resemble creation (invention) of law.

With Gadamer, contemporary hermeneutics has already embarked on this path. He compares two positions: those of the historian of law and of the jurist who come to work on the same subject, i. e. the same given legislative text in force. This text will thus be interpreted one time from a historical viewpoint and the other from a legal one. The primary objection to treating the two hermeneutics as the same is that the lawyer grasps the meaning of the law on the basis of a given case and with an eye to this given case, while the historian of law does not have a case available to start from, but on the contrary sets about determining the meaning of the law by reconstructing its whole field of application.⁸² However, through the exercise of *understanding*, the historian of law has to bring about mediation between a law's initial application and its contemporary application. Let us then point out, following Gadamer, that the jurist, in bringing about the exact adaptation of the meaning of the law, must first know the first meaning implied by its being stated. In that sense he is a historian of law,⁸³ just as we say that the historian of law is a jurist. The objection has thus to be overruled.

The second objection to treating the hermeneutics as identical seeks to emphasize that when it comes to a law in force the natural tendency is to think that the legal meaning of this law is unequivocal and that present legal practice is merely conforming to its original meaning.⁸⁴ If this were the case, the question of the meaning of a law in legal and in historical terms would be one and the same question. The interpretive theory of "respect for the legislator's will" to which Saleilles, Gény and their ilk responded is evidently inspired by this kind of conception. We know that this is a rhetorical argument, an unsustainable fiction: the meaning originally contained in a law and the meaning applied in legal practice come to be separated from each other,⁸⁵ since we know, once again, that a normative

⁸² See H.G. Gadamer, *op. cit.*, p. 166 ff.

⁸³ It is perhaps a bit excessive, too, to limit the question of application of law to the judge's function alone. Legal scholarship, in proposing - as we have said - a meaning for a law carries out an "application" of law since its normative content, when it comes to interpreting, must be determined from contact with the specific case to which it is claimed to apply.

⁸⁴ H.G. Gadamer, *ibidem*.

⁸⁵ "A description of works, even an analytical one, even a critical one, would be incapable of bringing out the intimate life of the science of Civil Law in France, the principle of development that has for more than 120 years made it evolve to the point of becoming

content can be determined only in application to a specific case. It must therefore be recognized that the notion of the original meaning of a text can be identified only on the basis of historical knowledge of that original meaning and through the application that that law was given. The approach is therefore simultaneously positivist and historical. Is the historian of law not doing exactly the same thing as the judge or the jurisconsult in distinguishing the meaning originally contained in a legal text from the legal content given to it at the moment when it is interpreted? The jurist and the historian are therefore in fact facing the same problem, since there cannot be any direct access to the historical object.

The last objection relates to the very hypothesis on the basis of which the two hermeneutics are treated similarly, namely that of a legal historian and a jurist working on the *same* text that is in force. We shall, with P. Ricœur, see the relation between past and present set up by legal hermeneutics, but we can already say, following the argumentation hitherto, that when it comes to the application of a text (which is not an arbitrary "invention" of meaning), then understanding and interpreting consists in knowing and recognizing an "acceptable" meaning for this text. *The jurist's present is also his history*,⁸⁶ for, let us not forget, his work consists in doing as was done in the past and handing on, in a continuum, the ever-better legal tradition. In the act of interpretation, the jurist is always a historian. And wherein is the legal historian always a jurist? To answer this question, we must refer to Veyne's work on the historical method. He tells us how the "meaning of history" is constructed: the historian seeking to understand the law on the basis of the original historical situation absolutely cannot abstract from its subsequent legal efficacy. The historical tradition is interrogated on the basis of the present, just as we can give meaning to the present on the basis of a reading of the past. In the act of interpretation, the judge, the jurisconsult or whoever are *creators* of law to the extent that understanding presupposes on the one hand a living relationship between interpreter and text, and on the other a pre-existing relationship with "the thing transmitted by the text".⁸⁷ All the doctrines of interpretation in legal science for two centuries, since the

radically transformed, though in the presence of a Code *all of whose major lines have nevertheless remained unchanged*." (our emphasis), Eugène Gaudemet, *L'interprétation du Code Civil en France depuis 1814* (Conférences données à l'Université de Bâle le 30 Novembre, 7, 14 and 21 Décembre 1923 - Paris, Bâle, 1935, Rec. Sirey.)

⁸⁶ H.G. Gadamer, *op. cit.*, p. 174.

⁸⁷ Quoting Bultmann, H.G. Gadamer speaks of "preunderstanding", *op. cit.*, p. 174.

arrival of what is now known as the rule of law, have been positing (in faithful respect for the fundamental principles of rule of law known as the separation of powers and the sovereignty of the legislator) that the judge cannot be a creator of law and therefore cannot, in the course of interpreting, "invent" anything at all.⁸⁸ The conception, the interpretation, that jurists themselves have (or have had) of these two principles bring them to seriously misjudge what the actual activity of judges in the operation of interpretation consists in. They definitely do "invent"; but we must properly understand what we mean by this term. It is only in interpretation that the meaning of a text to be applied is made concrete, but conversely, this interpretation remains entirely bound up with the text. Putting it another way, legal interpretation is not arbitrary invention. The real question is how understanding is "measured": on what basis does one consider that the invention is acceptable? Dworkin faced this problem and we know that his answer is contained in what he called the "principles", "standards", which he locates *beyond the law's own positivity*; what his interpretive method consists of is identifying them. The position we have taken is that the task of hermeneutics is to "understand what a text states on the basis of the specific situation in which it was formulated,"⁸⁹ and the consequence is that what an interpreter understands a text on the basis of can be found only in the law's own positivity,⁹⁰ which is, as it were, its concrete *a priori*, using Foucault's language. This is without there being any difference between historical hermeneutics and legal hermeneutics.

Interpretation is not free – the judge's or the jurisconsult's invention is not arbitrary – but subject to checking by society, relating to the intellectual pathways leading to the decision and to the argumentation sustaining the proposition. For this reason, it is obligatorily motivated in technical fash-

⁸⁸ This verb systematically recurs to state what the operation of interpretation ought not to consist of. Montesquieu, *L'esprit des lois*, XI, 6: "the judges of the nation are only the mouth that utters the words of law, inanimate beings that can moderate neither its force nor its rigour".

⁸⁹ H.G. Gadamer, *op. cit.*, p. 175.

⁹⁰ Let us now give the definitive definition of the concept of law (see p. 10): the interpreter finds (as far as the past, remote or not, is concerned) *and* decides or proposes the meaning to be attributed to a document, consisting of one or more statements, the meaning of which does not pre-exist the interpreter's activity but is its product. Before the activity of interpretation, the document that is its object expresses one or several "norms", understood as the meaning that has been given or been decided to be given or been proposed to be given to a document.

ion: a very close link can be observed between modes of interpreting laws and techniques of motivating decisions. Thus, it is through what is called legal "argumentation" that social control is exercised:⁹¹ the decisions attributing a particular meaning to normative documents or legal statements are motivated and argued on the basis of legal schemes regarded as "correct". The checking is thus effected through this drawing-up, whether implicit or explicit, conscious or otherwise,⁹² immediate or reflexive, theorized or not, of rules about the "correct" mode of argumentation aimed at the attribution or proposition of meanings for statements. If we have been able to define the law as an interpretive concept, this is because in our view the whole of the law lies in the act of making the legal statement under consideration; therefore it was only latent. Knowing the law is equivalent to stating the law (and "understanding is already applying"); this stating must be technical, the technique of legal science being the form of control society exercises over the activity of jurists. Since the law lies in the act of stating, if each interpreter were free in his way of stating the law, the law would no longer be meeting the obligations placed on it since early modern times, which are chiefly the tasks of rationally organizing social life (the function of predictability). In the act of stating what the law is, interpreters are bound by many rules that taken together aim at a single goal: coherence. Legal technique is what lays down a "syntax" for passing from the meaning of the legal statement, resulting from application, to coherence of the legal discourse. Nothing more. Here we are back at Dworkin's work. The interpreter states the law; the whole set of interpretations must be coherent. Hereby, we satisfy the function of predictability of the law. Regarding the world of law as endowed with coherence is a choice of agency of application, not an intrinsic character of legal discourse.⁹³ This choice becomes necessary as one enters the contemporary epoch, whether in legal worlds with a codified structure (like our Continental law) or without (like Common Law).

⁹¹ See Tarello, "L'interpretazione della legge" *op. cit.*

⁹² *Ibid.*

⁹³ The structure of the judiciary, through its hierarchicalization, is an essential aspect of legal coherence, and also of legal culture: legal practitioners learn that the law is "a system of norms", which are "preconstructed" and grouped into a "complete system". The idea suggests itself that all legal argumentation consists of a normative statement, which is a formal document of legislation, or the highest formal document in the hierarchy of sources ... See Tarello, *op. cit.*

The foundation of legal argumentation is coherence, the nature of which, as we shall see in concluding, is narrative. We have refused to distinguish between the normative function and the cognitive function of law, arguing from the fact that understanding (i. e. interpreting) is already applying. The action of understanding is in this sense bound up with the representation of situations. While accepting the similarity between historical hermeneutics and legal hermeneutics, Gadamer nevertheless refused to treat the legal method and the historical method as identical. The historian, he said, digs beneath the surface of the texts to wrest from them a confession they will not and cannot make spontaneously.⁹⁴ In this sense, he thought the historian's attitude towards his texts is like that of the examining magistrate hearing witnesses. But, and here is the big difference that forbids any equation of legal method and historical method, for the historian the point is not mere statement of fact but understanding the meaning that he finds in these statements.⁹⁵ We must therefore deduce that conversely, for lawyers, all that has to be done when it comes to stating the law is to state facts. Gadamer saw historical testimony and the declarations of witnesses before courts as the same phenomenon: an accessory to the statement of facts.⁹⁶ But here, in our view, he stopped halfway along the road he ought to have followed to the end.⁹⁷ For texts, understanding is application, but what about reality it-

⁹⁴ Here rather curiously, the old idea is resurrected of the "discovery" made by a reader through and in the text. H.G. Gadamer, *op. cit.*, p. 179.

⁹⁵ *Ibid.*

⁹⁶ H.G. Gadamer, *op. cit.*, p. 182.

⁹⁷ For L. Mengoni, Gadamer on the contrary went too far, for three reasons. Firstly, because the historian must always be ready to break off the hermeneutic approach carried out with models of his experience if it does not meet the "expected conditions of meaning". But the objection we might make to Mengoni would be: How does one know whence this "expected meaning" comes? The second criticism relates to the term used by Gadamer to designate mediation between past and present, "application", on the grounds that this term has a very marked meaning in legal science. However, the whole question is what the activity of interpretation in legal science or in history embodies. Having shown the respect in which this activity is similar for the two disciplines, we feel that the use of the term is perfectly justified. The third and last criticism of Gadamer by Mengoni takes up Betti's thesis of the difference between different types of interpretation, asserting that contrary to historical interpretation, legal interpretation is normative. We think the rejection of this distinction, and the justification given for that by Gadamer are entirely convincing. L. Mengoni, "Ermeneutica e dogmatica nella scienza giuridica", *Atti del VII Colloquio sulla interpretazione*, Macerata, *op. cit.*, p. 116.

self?⁹⁸ What understanding do we have of it? That understanding is bound up with application means that it is bound up with representation of reality; but how is this operation brought about? We have said elsewhere⁹⁹ that the expression "stating the facts", the interpretive theory whereby it is claimed to describe reality, is a particularly unfortunate one. A judge, a jurisconsult or whoever do not state facts. Or rather, the statement of facts is not immediate or direct, as the expression might lead one to suppose. These facts belong to an order that has to do with the hermeneutic act itself: interpreting a text is already constructing facts. The witness, referred to by Gadamer, is not an accessory to the statement of facts but a person participating in their construction. Positive thought posits that the basis of a text in general is given, as the facts themselves are, in the operation of interpretation. What we think is that neither the facts nor the basis of a text are given in the operation of application. Putting it the other way, ascertaining a precedent is never entirely repetition.

The historian, just like the jurist, can never directly and completely grasp an event; this is why Veyne says that history is an account of events,¹⁰⁰ "a true novel". The jurist's fact is the historian's fact: historical facts have a "natural organization"¹⁰¹ once the historian has chosen his subject, just as legal facts prove something once beforehand the rules of law have been laid down on the basis of which a conflict is to be settled. Facts, whether historical or legal, do not exist in isolation, but have objective links. "The choice of a historical subject is free, but within the chosen subject, facts and their links are what they are, and nothing can change them,"¹⁰² just as one may prefer to base oneself on civil-law rules of contract rather than labour-law rules when it comes to solving a labour dispute, but once this choice has been made, any fact whatever may be brought up. The reason is, as Veyne

⁹⁸ J.M. Broekman also picked up this point, "Changes of Paradigm in the Law", in *Theory of Legal Science* (Conference of Lund), *op. cit.*, p. 141: "Reality is said to be present in the files on the desk of the judge. Reality is said to be mirrored in those pages but it is not expressed in how far the legal reality is produced throughout the textualizing processes. The rules concerning the application of norms to situations are rules referring to texts."

⁹⁹ Cf. *Law and Reality*, this volume, Part 1.

¹⁰⁰ P. Veyne *op. cit.*, p. 14 ff.

¹⁰¹ P. Veyne, *op. cit.*, p. 35.

¹⁰² *Ibid.*

says, that "the web of history is a plot", just as we speak, by the way, of a legal plot. The fact is nothing without its underlying plot; there is no fact without normative source. Understanding a legal text is applying it, i.e. representing situations to oneself. A "quasi-identification"¹⁰³ has to be seen between the representation of situations and the arrangement of facts. The plot is this representation of the action, and it "forces us to think of together and define by each other the representation of the action and the arrangement of the facts".¹⁰⁴ Understanding a text, interpreting, is bound up with the representation of reality; a mimetic activity, as Ricœur says, insofar as it produces something, namely specifically the arrangement of facts through their being fitted into the plot. Jurists, like historians, recount plots, which are like "routes they trace as they will through the very objective field of events (which is infinitely divisible and not made up of event-atoms)".¹⁰⁵ The plot is a work of summarizing: through it goals, causes and chance are brought together; the plot of a story "brings together and integrates into a whole, complete story multifarious, scattered events, thereby providing a schema for an intelligible meaning to attach to the story taken as a whole".¹⁰⁶ That is why we were able to say that there is inevitably in the operation of interpretation an inventive aspect to which the judge, for instance, is condemned: the representation of reality¹⁰⁷ effected in understanding a text is never a mere

¹⁰³ P. Ricœur, *Temps et Récit*, Seuil, pp. 57-58.

¹⁰⁴ P. Ricœur, *op. cit.*, p. 59.

¹⁰⁵ P. Veyne, *op. cit.*, p. 38: "events are not things, consistent objects, substances; they are patterns we freely impose on reality aggregates of processes where substances in interaction, men and things act and are acted on", p. 39.

¹⁰⁶ P. Ricœur, *op. cit.*, p. 11. Also P. Veyne, *op. cit.*

¹⁰⁷ P. Ricœur, *op. cit.*, p. 76. This hermeneutic approach particularly illuminates P. Bourdieu's work, which shows how the judge is condemned to "create neutrality". This neutrality is the outcome of mediation: "the judicial situation acts as a neutral point, bringing about a genuine neutralization of the issues through distancing and rendering them unreal; this is what the transformation of the confrontation of the interested parties into a dialogue between mediators implies" (p. 9). It is because the interpretive act is itself creative that structures and rules are elaborated, whose goal is to efface that creation, to make it *invisible*. Legal language itself takes part in this obscuration: "(legal language) which, by combining elements taken directly from common language and alien elements into a system, bears all the marks of a rhetoric of impersonality and neutrality" (p. 15 in P. Bourdieu, "La force du droit, éléments pour une sociologie du champ juridique"; *Actes de la Recherche en Science Sociale*, Septembre 1986, pp.3-19).

carbon copy of preexisting reality already reflected in some previous decision; it is "creative imitation". Legal argumentation has a narrative structure,¹⁰⁸ and the legal plot a mediating function. This is first of all mediation between events, facts, and an account, a story, taken as a whole. A fact receives a definition only from its contribution to the development of the plot. Every type of fact becomes grist for the historian's mill, according to Veyne, since he has at his disposal concepts and categories that allow them to be apprehended.¹⁰⁹ Correspondingly, the plot is more than an enumeration of events, of facts; it organizes them into an intelligible whole (and when it comes to legal interpretation, we speak of "relevant facts", "conclusive facts", etc.) Secondly, then, it is a shaping act: it allows the meaning of the rule to be stated. Interpreting a text, understanding a text, is also understanding how and why some facts are called in to support the technical arguments in which legal argumentation unfolds and which allow a certain conclusion which, far from being predictable, must appear to be "reasonable".

Ricœur shows that the plot configuration imposes, on the indefinite sequence of incidents, the "meaning of the end-point:"¹¹⁰ as soon as a story is well-known, following it "is less trapping surprises or discoveries in recognition of the meaning attaching to the history taken as a whole than seeing the episodes, well known in themselves, as leading to this end".¹¹¹ Through the plot, thus, we learn to read the end in the beginning, and the beginning in the end. The plot leads us to an analysis of circular type, which MacCormick regards as vicious.¹¹² But there is not a vicious circle, but "infinite regress".¹¹³ Not having any direct and immediate access to the events, we

¹⁰⁸ See also J.M. Broekman, *op. cit.*, p. 142: "The texts form a topology of the legal paradigm. This textuality is not a linear phenomenon and the textual character of legal discourse is not characterized by linearity ... The legal dogmatic paradigm is characterized by the fact that it transforms narrative structure into linear products."

¹⁰⁹ The legal fact is no exception to this rule; we refer, for instance, to G. Farjat, who (justifiably) complains of the absence of rules in economic law and the absence of ... economic facts. *Droit Economique*, PUF.

¹¹⁰ P. Ricœur, *op. cit.*, p. 105.

¹¹¹ *ibid.*

¹¹² See above, p. 25.

¹¹³ P. Veyne, *op. cit.*, p. 74.

said the lawyer is faced with the problem that Veyne calls retrodiction:¹¹⁴ and this problem is a problem of likelihood of hypotheses. By retrodiction of the effect we seek to trace back its hypothetical cause. "The historical facts that appear most consistent are in reality conclusions that include a considerable proportion of retrodiction", Veyne tells us, and we know that this is just as true of legal facts. Legal debates are rich in these plots, where "all the facts show" that such and such a person is certainly guilty. The difference from a plot that puts missing persons on a stage is that for a legal plot, on the assumption that the accused actors are alive and present,¹¹⁵ the retrodiction may be practically certain. If we thought we could reject the distinction proposed by Dworkin between natural science and legal science because the latter could not be understood on the basis of explanatory principles of causal type, that was because on the contrary we consider that legal science does bring an explanation of causal type into play. The dividing line passes not between facts of the physical sciences and facts of legal science, but between interpretation in physical science and interpretation in legal science.¹¹⁶ The former subsumes facts under laws, while the latter integrates them into plots. Incorporation into a plot is what makes a fact into a "legal fact".¹¹⁷ The historian is in the same position as the jurist who, in an actual situation of dispute, seeks to prove that such and such an explanation is worth more than such and such another one. Dworkin, for whom, however, facts are not a problem since recording reality is direct and immediate, nevertheless states¹¹⁸ that beside "hard facts" there exist facts that have a certain narrative consistency, thanks to which a better interpretation is possible. In consequence of what we have just said, we might argue that the idea of hard facts is already the consequence of an interpretive theory within which the plot, through coherence, is induced to create facts that have narrative consistency.

¹¹⁴ P. Veyne, *op. cit.*, p. 97.

¹¹⁵ Or determined, which is sometimes a problem, for instance in economic law or with the practices of trusts, subsidiaries etc.,

¹¹⁶ See P. Veyne, *op. cit.*, p. 21.

¹¹⁷ For which the term "fait d'espèce" is also used.

¹¹⁸ R. Dworkin, "Is there Really no Right Answer in Hard Cases?" in *A Matter of Principle*, *op. cit.*, p. 139.

Hard facts would not then be in opposition to facts with narrative coherence; they would themselves be such facts, and therefore the very product of a plot.

Where rules are perceived as non-contradictory, where social control is bound up solely with the phenomena of imitation of precedent as "product/application" of rules, then legal work consists in identifying the document from which a normative premise is extracted. It is here that the work of hermeneutics comes in. Identifying the document, stating a normative premise, consist of creative imitation; and no decision or proposition can ever express a legal truth that would subsequently be recognized systematically and objectively. What may possibly be arrived at is not some truth of a reality that lies outside the rule and comes to meet a pre-constructed rule, i. e. one with an intrinsic meaning that imposes itself on the interpreter, as a meeting from which an objective rational and predictable social code would emerge. What emerges is a model.¹¹⁹ Narrative coherence, the structure of legal argumentation, thus refers to the sequence of models. It is a phenomenon of imitation, but of creative imitation.¹²⁰

¹¹⁹ Dworkin's metaphor of the chain of novelists writing the same novel in succession, applied to the what judges do, therefore has something in it, we feel.

¹²⁰ Creative imitation, through this notion of model, might also be a rule of argumentation of authoritarian type (decision of a higher court to be imposed on inferior ones); we find this argument in both "common law" and "codified law."

THE JURY AND REALITY

ZENON BANKOWSKI

(1) INTRODUCTION

A popular way of attacking the jury has been to say that "too many people who are guilty are getting off". This implies that the jury does not get it right and is failing in its functions as a means of determining the truth of the matter. This raises two differing but, as we shall see, related questions. It raises first of all an epistemological question about our notions of truth and fact gathering. In the second place, it raises a political and ideological question about the purpose and function of the jury. What I will do in this paper is to look at the jury and to suggest lines for its defence. I will go about this in the following way. Firstly, I will suggest that one must view the jury within the context of the trial system as a whole. Secondly, I will argue that Frank's attack (1930, 1973) on the adversary system does not work theoretically because of misplaced epistemological views. I will suggest a different epistemology which could be compatible with the adversarial system. Thirdly, I will justify the role of the jury within this system. Finally, I will attempt to justify the adversarial system both as one that has an integral role in our liberal society and as one which could be compatible with other forms of society. I will start with the epistemological question and use it as a basis for looking at some of the ideological questions that surround the jury and jury controversy.

There is an easy way of answering the criticism I started off with. We may say that our critics are putting their plaint in rather a loose way. "Guilt" is a word that is used internally to the law. It is an ascription that comes at the end of a specifically legal procedure and must not be confused with lay views of whether "he did it". In other words, the ascription "he is guilty" is not the same as the "he did it" made by (say) a policeman. What is the implication of this? It implies that? legal procedure constitutes the truth for the purposes of the law and legal truth is different from policemen's truth, from lay truth and so on. It implies that there is no reality by which one can

measure whether something is truthful or not, that truth is something that is constructed within particular language games. Thus truth is particular to, and constructed within, specific modes of life and the "truth" of one mode cannot be judged against the "truth" of another. This way of looking at reality has its origins both in sociological research and in philosophy and implies a coherence theory of truth. This can be opposed to a correspondence theory. The latter theory is at base simply the proposition that when this or that happens, it really is so and that my statement concerning it is true. Thus the statement "the grass is blue" is true if and only if only the grass is blue. That is to say, a statement is true if and only if it corresponds to reality and false if it does not do so. As we can see this implies some kind of independent reality by which we can measure the truth or falsity of our statements.

The coherence theory, on the other hand, is one which measures truths by their "fit" within a given system. I shall talk more about this conception later but here it is sufficient to say that it goes well with sociological ideas of the "social construction of reality". Thus Michael Freeman says,

There is an assumption that somewhere out 'there' is a right answer, an objective truth almost ... What this discussion shows is that the lessons of deviancy theory do not seem to have had an impact on jury researchers. The problematic nature of deviance, its relativism, the importance of meaning in relation to acts has not rubbed off on those inquiring into the role of the jury, and this in spite of the jury's activity as a focal labelling agency. Instead researchers cling to official versions of the truth, to positivistic conceptions of the right 'answer', to a belief in a static, simplistic, model of decision making ... Of course jurors understand facts. In the jury box they function as they do in the every day world. They make sense: they construct a reality. (1978 pp. 15-16)

There is now much research which takes to heart these admonitions and looks at the way that reality is constructed in the court-room. Much of it can be said to have, at base, a coherence as opposed to a correspondence theory of truth.

The claim above, then, is that the ascription "he is guilty" bears no relation to any such ascription as "he really did it" because they are constructed in different institutions or modes of life. But there is another way of looking at it which makes more modest epistemological claims than the theory put forward above. We do not have to deny any relation between "he is guilty" and whether "he really did it". Rather, we can say that there is a relation between the two statements but not imply by this that the "he is guilty" of the court and the "he did it" of the policeman are equivalent statements, true if it really were the case. I want rather, to marry the two

points of view. These two statements are the end points of different, unrelated methods for arriving at the truth. They do not constitute truth but are different ways of getting at what really happened. However, we can only get at what really happened through these procedures which I will call truth certifying procedures. We cannot judge the validity of these procedures by the criterion of truth since we can only get at that through these different procedures. This has an effect on the truth that comes out of them. And it is this that gives us the resemblance to the "social construction of reality" theory.

(2) THE JURY WITHIN THE TRIAL SYSTEM

I now turn to explain this position more clearly and to examine its political and ideological consequences. I do this by looking at the work of Jerome Frank (1930 and 1973). It is important to note that Frank in his two major works on this topic, "Law and the Modern Mind" and "The Courts on Trial" did not just examine, and attack, the jury system. Rather, his critique was directed at the fact-gathering process as a whole. This is important because Frank saw, as many more modern commentators did not, that the jury cannot be viewed in isolation and that one must study the trial institution as a whole. Many studies of the jury have fallen into the trap of regarding the jury as a small group and studying its "rationality" in the tradition of the small group studies of psychology. But the difficulties of this experimental social psychological method have never been adequately resolved. The problem here is one of authenticity. How can we ever be sure, having no real juries to experiment on, that the conditions in which we set up our experiment will be the same as that of the actual jury box and room and, if they are not, what difference it would make? But the problem is more than just whether or not "simulation" studies can provide insights into the behaviour of the jury. By regarding the jury as simply another manifestation of the small group we find that one starts to use small group theory to explain the attitudes and activities of jurors. But, as we have seen, the jury should be considered as part of another system, that of the trial and the whole fact-finding process. It is from there that it picks up its cues and learns what to do. The juror most often comes to court as someone completely ignorant of the courts and he learns from the actual experience of being in court. Kalven and Zeisel (1966) showed, for example, that many jurors considered their verdicts correct because they thought that this was the verdict that the judge wanted them to reach. One can see many examples of trials where the judge by his action affects the decision of the jury. Indeed most trial lawyers know the effect that a judge can have on a jury and present their cases

accordingly. I do not, however, want it to be taken that I am claiming that the jury is always influenced by the judge and is merely his mouthpiece. Juries have and do acquit in the face of the judge. The point I want to make is that research which looks to the interaction of the jury in its deliberation as the key part of its decision making will miss crucial dimensions of the trial. (Cf. Ulmer 1971 and Mungham and Bankowski 1976).

(3) JEROME FRANK AND THE TRIAL PROCESS

The aim of the last section was to make it clear that the jury should be viewed within the context of the fact-gathering system as a whole. I now turn to my more modest epistemological position and introduce it by considering Frank's (1973) attack on that system of fact-gathering known as the adversary process.

Frank asks just how it is that a system which has its roots in the ancient trial by combat can be just. The just settlement of legal disputes, he claims,

demands a legal system in which the courts can and do strive tirelessly to get as close as is humanly possible to the actual facts of courtroom controversies ... to treat law as, above all, a fight, surely cannot be the best way to discover the facts. (p. 102)

According to Frank, the nature of the adversarial system is such that it is ridiculous to assert that it enables one to get at the truth. Quite apart from the abuses to which such a system is prey, this method would oblige people to skirt over bits in their story, to gloss over gaps and so on. Such reconstructions could produce nothing like the truth.

But such inaccurate testimony, not to be classified as perjurious, results from a practice that is not dishonest: every sensible lawyer, before a trial, interviews most of the witnesses. No matter how scrupulous the lawyer, a witness, when thus interviewed, often detects what the lawyer hopes to prove at the trial. If the witness desires to have the lawyers' client win the case, he will often, unconsciously, mould his story accordingly. Telling and retelling it to the lawyer, he will honestly believe that his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed. So we have inadvertent but innocent witness coaching. The line, however, between intentional and inadvertent grooming of witnesses cannot easily be drawn. Now, according to many lawyers of wide experience, the contentious method of trying cases augments the tendency of witnesses to mould their memories to assist one of the litigants, because the partisan nature of the trial tends to make partisans of the witnesses. They come to regard themselves, not as aids in an investigation

bent on discovering the truth, not as aids to the court, but as the "plaintiff's witnesses" or the "defendant's witnesses". They become soldiers in a war, cease to be neutrals. (p. 86)

He compares it more specifically with a game or fight, quoting Damon Runyon,

A big murder trial, he wrote, "possesses some of the elements of a sporting event. I find the same popular interest in a murder that I find ... on the eve of a big football game, or a pugilistic encounter, or a baseball series. There is the same conversational speculation on the probable result, only more of it ... The trial is a sort of game, the players on the one side the attorneys for the defense, and on the other side the attorneys for the State. The defendant figures in it mainly as the prize ... And the players must be well schooled in their play. They must be crafty men." (p. 91)

Runyon, accurately at times, describes what happens to defendants in this sort of trial and foreshadows a lot of modern sociological work on the operation of the trial and people involved in it. I will discuss this when we come to look at the ideological questions which arise when one is thinking about the jury. Now we must note that Frank's objection is that the logic, not merely the practice, of the system is incompatible with finding or pursuing truth. There is something about the idea of the "fight game" that makes people like Frank uneasy. The idea of a "game" introduces ideas of artificiality and conventionality which do not seem to have anything to do with the serious business of "finding the truth" or "what happened". Here we come to an ironic point, for though Frank is labelled a fact sceptic, he is not really sceptical about facts or true propositions. His whole critique is based on the idea that it is possible to get really true facts about the world but that the adversary system is the wrong way of going about it. Frank and those who follow this line of reasoning are concerned with seeing how the procedures of law operate when judged for their reliability as procedures for establishing the "truth". The conception of efficacy employed is whether or not these facts or events "really happened".

(4) THE DISCOVERY OF TRUTH

Such a search for truth is based on epistemological premises which need to be more fully explored. Frank's view confuses the relation between the truth of the matter and our apprehension of it. This can be explored by studying the relationship between justification and discovery. Frank, and others, think that there must be a clear and obvious way which settles all that one needs to

do or should do to find the truth. The truth then, is something that can directly be discovered and we can test our artificial conventional games such as the trial by reference to this direct discovery. The image of "finding the truth" here is that of someone "discovering" the source of a river in what seems the most obvious way, by sailing to its beginning. But is that the end of the matter? Is that all I have to do to know that I have got to the source? This is not the case, for I must also have a theory which will explain why, if I sail up the river as far as it will go, I will have arrived at its source. The theory must be able to specify precisely what the end of a river is to count as: it must distinguish, for example, between mainstreams and tributaries or backwaters. It is only in this way that I will have a coherent picture of what I am doing when I say that "I am discovering the source". Otherwise I might go up a backwater and declare its termination the source of the river, missing out the mainstream that might go on for hundreds of miles. Or, to take a historical example, I might find myself in the position of a Christopher Columbus who, not having the possibility of a new continent in his theory, thought he had reached India and proved that the Earth was round, when in fact he had arrived at what is now known as the West Indies. "Go until you hit something" is not a clear enough theory; it is also necessary to have some justification for counting what has been hit as "discovery".

Wasserstrom (1968) argues that these sort of examples show that justification is independent of discovery and, therefore, the American Legal Realists were wrong about judicial decision making because legal reasoning is concerned with the justification and not discovery of decisions. Wasserstrom was, of course, talking of the rationality of judicial decision making with reference to moving from general rules to specific instances. He was not concerned with a decision on the facts.

Let us take an example which Wasserstrom uses. A scientist has discovered a vaccine which purportedly provides complete immunization against cancer and tells the world that he has discovered this by putting 1,000 possible chemical combinations in a hat and drawing one out. Here Wasserstrom distinguishes the question of how the scientist selects the formula from the question of whether it will, in fact, immunize - answering the first and not the second. Hence, he claims, justification and discovery are different.

But is it as simple as that? Wasserstrom goes on to say how justification and discovery might be related.¹ There is an asymmetrical relation between

¹ See Berger and Luckmann (1966), and Hospers (1967), who gives a good introductory account of philosophical theories of truth.

them. That is, a method of discovery is adopted if it succeeds in generating more justified conclusions. "In a real sense", Wasserstrom says, "the logic of justification provides criteria by which both particular conclusions and the procedures of discovery may be evaluated".² Rational behaviour means, according to Wasserstrom, that one should not put forward a conclusion or act on a decision until it has been substantiated by some justification procedure.

For Wasserstrom these are contingent relations. But this point of view can only be held by artificially curtailing the notion of discovery. Take Wasserstrom's example again. When the scientist announces to the startled world that he has discovered the cure for cancer in the strange way mentioned above, what would our reactions be? We would not say that he has not discovered it for we assume that part of the process of discovery is showing that it actually works. We would tell the scientist to test the substance by giving it to people (or whatever medical scientists do) and we would assume that this was part of the process of discovery. This way of looking at it fits in more readily with our ordinary way of speaking. If we take Popper's (1968) view of the logic of scientific discovery, then Wasserstrom is equating the stage of the choice of hypothesis with the whole process of scientific discovery. It may be that that process is irrational (Popper argues that it is not since the hypotheses have to have some chance of being true and are picked out by members of a community of science), but it is straining language to demarcate that as discovery and the rest as justification.

What all this leads to is the fact that discovery is purposive activity in the sense that it comprises actions which have to be interpreted under some theory of justification, and thus "discovery" cannot be independent of justification: one cannot separate the two. Discovery includes justificatory activity. You can only be said to have been taking part in the activity of discovering because your theory transforms otherwise random behaviour into purposive activity. When one discovers by chance, as Fleming did with penicillin, the original chance event is reinterpreted as discovery. Some sciences might also have institutionalized random procedures. In these cases the activity is not "random" in the same way that it is purposeless; rather, the random procedure represents the theory of discovery.

The purpose of this argument has been to show that we do not have immediate access to the "truth of the matter". We cannot, in terms of our example, discover the Nile just by sailing up it. We have to have procedures

² See Bankowski and Mungham (1976), Bennett and Feldman M. (1981), McBarnett (1981), Blumberg (1967), Carlen (1976), Freeman (1978). In particular, Freeman (1981) is an excellent and thorough account of the jury and jury research.

for discovery - the apprehension of truth - which cannot be separated out from the truth of the matter, justification. We cannot, when talking of what we know, separate the truth of the matter from our method of apprehending it. The facts we know are constructs, partly determined by the procedures of discovery which in turn depend upon procedures of justification. The search for truth is something we only undertake through institutional procedures which give us criteria enabling us to describe our activity as truth seeking. Now these criteria are not obvious for all to see - they cannot be "discovered" - rather, they are normative. It is in this sense that the activity of epistemology is a normative activity and the radical separation of the "is" from the "ought" is not so easy in a world where "is" statements are so by reference to normative criteria.

I will take another example to illustrate and prove this point. Here I show that notwithstanding the debates about the foundation of logic, this form of rationality is a procedure which can only be understood when instantiated in concrete social practices justified by appeal to appropriate values. MacCormick (1976) talks of what he calls the logic of acquittal. If we view the law, in some cases at least, as being an example of standard deductive inference (P implies Q , it is the case that P , therefore, the conclusion follows, Q), then in those cases we will not be able to show that someone is innocent for "not Q " does not follow from showing that it is not the case that P . Thus if the law is an exercise in rational reasoning (and hence at least partly deductive) that leaves MacCormick with the unpalatable conclusion that the court can never show someone to be not guilty. For example: "if you murdered Z , you will be sentenced to life imprisonment. You did murder Z , therefore you will be sentenced to life imprisonment" is a sound example of legal reasoning. But if it can be shown that you did not kill Z it does not follow that you should not be sentenced to life imprisonment and thus acquitted. Compare: "if you eat this poison, then you will die. You have eaten this poison, therefore you will die". It does not however follow that if you did not eat the poison then you would be immortal? MacCormick gets out of this quandary by claiming that since this is the logical position, there has to be provision in the law for dealing with it. It is by rules concerning the burden of proof and related matters, he claims, that the law makes such provisions:

Since it is a requirement of law that a plaintiff/pursuer must state and justify any claim he makes against a defendant, and likewise a requirement that any prosecutor must frame a specific charge or charges against a particular accused person and prove it or them "Beyond reasonable doubt", it is legally - and logically - justified to absolve or acquit the defendant when that requirement is not met. (p. 44)

In modern complex societies, he argues, it is a practical impossibility to work on the assumption that people have committed any one of the countless possible breaches of legal regulation and so we must have some system of preventing citizens being forced to prove their innocence. We must assume that the burden is on those who want to prove someone guilty. There is then a "practical necessity" that the burden of proof must lie with the prosecutors for there must be some criterion for bringing an action and that must be based upon the possibility of proving averments.

But the use of logical arguments becomes a sham if we truckle with the pretence of deeming contingent averments true without any adduction of evidence for them. The respect for rationality within which respect for logical argumentation is subsumed provides strong, if tangential, support for that conception of the "burden of proof" in criminal trials to which, however, imperfectly in practice, liberal states in public theory adhere. If we ignored the logic of rule application we should be hard pressed to account for the importance of the idea of the burden of proof, as already stated and now more fully explained. We should be equally hard pressed to account for the problem which legal systems face, and deal with differently, concerning the required degree of specificity of averments in civil pleadings and criminal charges. (p. 48)

In strict logic, of course, this would not be illogical, as MacCormick himself admits. What he must mean, when he talks of "sham", is that one cannot imagine just the empty logical frame - rather it must be seen as something embedded in a concrete institution and social practice for truth-finding, the trial. This can be seen in the rules of procedure which force the specification of instances which have to be proved. To this extent, adjectival law is necessary because of deductive logic but that logic does not justify the institution *per se*. Rather it is affected by the institution's need to produce a secure "not guilty" verdict. And this, as we have seen, is justified normatively, by practical and moral considerations.

(5) TRUTH, THE TRIAL AND THE COHERENCE OF THE CASE

The trial then is an institution which gives the ground rules for the alternative verdicts "guilty" or "not guilty" which are internally linked to the propositions "he did it" and "he did not do it" of reality. How does the trial procedure then arrive at the "truth"? What is the point of the process? The aim of the process is, I suggest, to produce a coherent story or picture of the events and reality under dispute. Although I am here using concepts of coherence which immediately bring to mind notions of the coherence theory

of truth and the radical epistemological position of the "social construction of reality" with which I started out, this view can also fit in with our more moderate position, a particular truth-certifying procedure. The end result of this process can still be said to bear some relation to reality. MacCormick (1982) explores this notion of coherence. The aim is the construction of a coherent picture, rather like the construction of a jigsaw puzzle where all the pieces come together. This is illustrated well by the case of *R. v Voisin* (1918) 1 K. B. 531. A parcel was found in Regent's Square containing the dismembered trunk of a human body. Attached to the parcel was a piece of paper on which was written "Bladie Belgiam". Louis Voisin, under strong suspicion for the murder, was asked in the police station to write the words "Bloody Belgian". The police then searched his rooms and those occupied by the late Emilienne Gerard. They found traces of human blood in both. In an adjacent cellar to which Voisin and a woman named Roche had the key they found the severed head and limbs of the deceased. Voisin was arrested and found to have the keys to the cellar on his person. He was convicted of murder and on appeal the conviction was upheld. There is, MacCormick says, an obvious coherence or fit between the various parts of the Crown's story, for example,

(i) that Voisin spells 'Bloody Belgian' 'Bladie Belgiam' makes it highly probable that he wrote the note on the parcel: such spelling errors are idiosyncratic, and only a tiny number of people would make this mistake once, let alone twice. Correct spelling is, by contrast, unremarkable and unidiosyncratic.

(ii) There were blood stains in the rooms he occupied.

(iii) The limbs and head of the corpse were in the cellar.

(iv) He had the key to the cellar.

These facts cohere together in a way which makes it credible beyond reasonable doubt that Voisin had some connection with the body, either by way of killing it or at least by way of disposing of the body which had met its death by other means. If the latter was the case Voisin had a strong motive to give evidence to that effect. He elected not to do so. At the trial no unfair mention was made of his exercising the right to silence. The Court of Criminal Appeal held that the judge did not misdirect the jury in that he failed to invite them to consider the possibility that there was some other explanation of Gerard's death. In the circumstances the jury were free to hold that such doubt was far-fetched and fantastic: not a reasonable doubt. (p. 49)

This view, we can see, will fit both epistemological positions. MacCormick says that it works whether one adopts a coherence or correspondence theory

of truth. If we adopt a coherence theory, then the fit is all that is necessary and truth is constituted in the procedure by the concept of "fit". However, the view adumbrated by McCormick does not excluded the correspondence theory. For one can say that coherence works because it is the only procedure for such proofs that cannot be checked by observation and we find that our general knowledge of the world and the way in which it works shows that if events fit in this way then they are likely to correspond to reality.

We can thus be agnostic about the general epistemological positions? regarding "correspondence" or "coherence", and note that the main point of the trial is constructing a coherent picture of reality. But it is a bit more than that. It is also a way of testing rival coherent pictures. In a murder trial, thus, the question is whether the proposition "X killed Y" fits better with the other pieces of the story available than the proposition "X did not kill Y". One can see this in the Voisin trial where the defence claimed that there was an alternative explanation and that the proposition "Voisin did not kill Emilienne Gerard" best fitted with the available facts. In a conflict of evidence then, two rival "coherent" pictures are put forward and one has to judge between them in respect of their coherence and consistency. Herein lies the point of the fight theory because it is standard in trials for opposing views of the world to be put forward. One party will say that the legal solution is "X", the other that it is "not X" and both these propositions will rest, in some respects, on judgements on the facts. The point of the adversary system is to provide some way of testing the coherence and consistency of these rival stories:

I suggest that the only type of test we have available to us for verifying contested assertions about the past is this test of "coherence": taking all the evidence that has been presented to us in the way of real or testimonial evidence we work out a story that hangs together, which makes sense as a coherent whole. And, of course, this involves the direct, visible, audible performance of witnesses, appearance of productions, and such-like within a web of general assumptions, beliefs and theories - no doubt rather inexact unscientific theories. (1979, p. 12)

(6) THE TRIAL AS A TRUTH-CERTIFYING PROCEDURE

In this sense, then, we can say that the trial procedure does not constitute legal truth, as our more radical epistemological position would have it; rather it forms what I will call a "truth-certifying procedure". "He is guilty" is an internal statement of that procedure and is constituted by it, but that procedure also gives us a warrant for saying that there is a relation to the "he did it" of reality. However, the procedure one adopts affects, as we saw

above, the end result. Our knowledge of truth and the "facts of the matter" is inexorably linked with the procedure we adopt for certifying it, which itself determines the outcome. But this does not make truth seeking and the pursuit of knowledge a "game" in the sense that it is purely and exclusively conventional and artificial. The procedure of scientific cognition itself has the sort of constitutive character that I have been discussing above, being dependent upon the set procedures for getting it. The points I have been making can also be made in respect of, for example, Popper's (1968) scientific methodology. Though the method is constructed around the logico-deductive system (the experimental falsification of predictions logically deduced from hypotheses), it assumes ultimately that the fit with the world, which can only be known through this procedure, will be guaranteed by scientists whose experience is our best means of access to reality. This of course colours our view of reality which would have been very different if based on communities of politicians or basketball players. The conclusion that it is scientists whom we must trust is plainly normative. Since this is to be our access to reality, the choosing of scientists instead of basketball players to be its guarantors must rest in part on pragmatic principles and in part on decisions about the kind of world we want to see.

Frank, as we have seen, was critical of the jury as an instrument of finding the truth of the matter and many modern researchers have tried to prove or disprove his views. What I have tried to do so far is to lay bare the (incorrect) epistemological assumptions upon which this debate is based. In the case of the trial, we may say that the conclusion comes from the judge or jury's view of a complex set of data which has been filtered through the trial and the laws of evidence and procedure. These procedures and criteria are justified normatively and we cannot say that a result obtained through using one truth-certifying procedure is wrong by reference to the procedure and criteria of another method. We can compare criteria but in doing so we have to operate at a different level. We might then find that both sets of criteria are appropriate but in different circumstances.

Let us take an example: according to our rules of evidence past convictions are not to be counted as evidence of present guilt, hence the rule that, except in certain circumstances, the prosecution cannot lead evidence as to the accused's previous convictions. The justification for this sort of anti-inductivist stand is well known and ultimately pertains to the moral basis of the system: the presumption of innocence and the burden of proof. The procedure for the police does not however employ this anti-inductivist criterion and indeed the police would be in dereliction of their duty if it did. If a crime has been committed, we expect the police, within limits, not to ignore their knowledge of known malefactors on the assumption that all past

evidence is to be ignored. We expect of the police, then, a laxer criterion than we do of the courts. We should therefore not be surprised that the police make more arrests than there are convictions. This is one of the ways the system should work.

The idea of truth finding being a game is only strange if we think that we can have instant and direct access to the truth (as did Frank). What makes the trial such a good philosophical analogy is that by examining it we can see that the reality-finding procedures which we have are not necessarily based on the "rational" but can be normative and moral as well.

The underlying assumptions of the view which I have been attacking, where the search for truth leads to the radical separation of epistemological and moral criteria, can have dangerous policy consequences. That view can lead to weighing morality and justice against "rationally getting at the truth" and discarding the former. This does not always mean that torture will be justified to get at the truth but the temptation will always be there. One cannot see getting the truth as a separate value, rather it must be seen, as I have shown in the context of a procedure where all the different moral, pragmatic and logical strands are inextricably intertwined and the justification is of the procedure as a whole.

One must be careful not to infer from all this the idea that our ordinary notions of rationality and objectivity have no part to play in the trial process. Twining (1982 and 1984) attacks sceptical views because they seem to cast out this rationalistic tradition. But the view which I am considering does not imply that mathematics, probability, science, expert witnesses and the discussion of the scientific problems concerning these, have no part to play in the trial process. Plainly they do. Parts of other truth-certifying procedures can be fitted into the trial process. Indeed, they play an important part in it. They do not, however, stand there in their own right but rather as part of the trial process. I disagree then, as does Twining himself, with those who imply that all adjectival law used in the trial process is ultimately to be justified through mathematics. Some parts will and some will not, but there is no necessity that they be, and the ultimate justification for the whole complex is not an "objective scientific" one but is rather a moral and pragmatic and political mix. The choice of the procedure is ours and not determined solely by "the truth of the matter".

(7) LEGALITY, THE ADVERSARY SYSTEM AND THE JURY

All the foregoing has been by way of epistemology. What I have been looking at are epistemological problems concerning the fact-finding process. For reasons which I have given, I have not been concerned with the jury

specifically but rather the trial process as a whole. But what of the jury? The arguments I have given might serve to defend the adversary process as a whole but do they defend the jury itself? What were Frank's specific criticisms of the jury? Briefly, they were that he saw the jury as an obstacle to the establishment of legal certainty. Time and time again he attacks the jury system, recording jurors' biases, their inability to absorb and remember the mass of evidence in the trial and the inadequacy of the secret and collective deliberation process. Given all this why have juries? What is wrong with trained officials such as judges who can at least be trained scientifically? Much jury research has gone along this way, implicitly sanctifying the legal expert. A string of research, starting from Kalven and Zeisel's work on the American Jury Project, has been interested in explaining how it is that "perverse" jury verdicts are not so. How can they tell this? What is the criterion whereby we can say that the jury has it right or not? The criterion mainly employed in these studies is one of comparing jury verdicts against "expert" views, mainly those of lawyers or judges. Thus Kalven and Zeisel (1966) tested the verdicts by the standard of a professional judge; McCabe and Purves (1974 p. 9) described how acquittals were viewed "by the police, by defendants, prosecuting lawyers, and, where this was possible, by the judge". Zander (1974) tested acquittals against opinions of counsel and Baldwin and McConville (1979) tested the verdicts of Birmingham juries against the views of the judge, solicitor and police. The main trend then, has been to verify the accuracy of the jury by the opinion of experts, usually lawyers. We will look to the ideological implications of this later; here we are concerned with how we can specifically defend the jury, granted that the epistemological arguments which I have used could be deployed to propose the employment of a more suitably trained judiciary.

To do this we must turn, once again, to look at the "fight-game" theory. What I have said so far has been by way of claiming that looking at the trial process in this way is not necessarily to attack it. Much sociological work has been concerned, not with using this as a negative analogy but rather with seeing how the game is, in fact, played. The key factor of the game is the presentation of differing coherent pictures of reality, as we saw when discussing MacCormick's work. For this the fight is vital. Viewed from the perspective of organizational sociology, however, one may question whether proper performance of the adversarial system takes place, i.e. whether the fight really exists. Studies of plea bargaining, of the part negotiation plays in contested issues, show that much of what goes on in the court-room has already been settled beforehand by the lawyers and professionals involved. Studies of the activities of the higher judiciary also show much extra court activity and negotiation settles the issue before the stage of the actual

"fight". All this work shows that the court is able to function only if there are, to some extent, extra-legal arrangements to help the process along and settle the cases "reasonably" before the actual trial. Looking at it in this way, we can see how the proper performance of the adversarial system can inconvenience the "regulars" in the court. By this is meant not the defendants, who do not usually come there often, but rather those who spend most of their working lives in the court-room, the lawyers, police and judges.

What all this goes to show is that in practice there is no "fight", and what we often get is a sort of mock fight, the contest being purely formal and the defendant a bemused spectator on the outside. Defence lawyers do not escape from this either for they are also among the "regulars" for whom too much of a fight might be inconvenient. The drama therefore takes place in a social world characterized by highly formalized patterns of interaction between participants who mainly subscribe to the same legal view of things. What we have is something on the lines of professional wrestling where although there is often no "real" fight, the results being in many cases rigged, this does not detract from its stylized "reality" (cf Barthes 1973). Thus, in this sort of model people come together with a particular view of the world and recreate and reinforce it. It is here that the jury fits into the system. The point of the jury is to guard against this stylized fight, to inject a "lay acid" into the system which helps to ensure that the "fight" does not always go its preordained way. It prevents the closed shop of the legal expert. The jury is an element of lay participation in the system, standing both within and out with the law. It forces some demystification of law because lawyers have to address lay people, it is no longer just expert speaking unto expert. Though jurors learn how to be jurors from their experience in the court, their views and actions will also be affected by their experience outside the court-room. If the juror experiences the world outside the jury-box not as the calm, consensual and just one portrayed by liberal ideology, but as one which is full of conflict and injustice, then that experience is also brought into the court where it can counter the orderly legal consensual view of things and lay bare the contest as real and not stylized. It is here that one can see the ideological significance of the jury research that I discussed above. The implication of the methodology of using, in the main, legal "experts" to show whether acquittal rates are too high or too low is that the good juror is one who is good as a lawyer,

one who accepts the prevailing court-room norms of legal rationality and who is willingly incorporated into the social order of the court-room and the trial. (Mungham and Bankowski, 1976, p. 210)

By this method of verification of the truth or falsity of a jury's verdict these studies serve to reconstitute the juror in a legal and sometimes scientific mode. By doing so they tend to exclude his or her function of being a surrogate for the society as they experience it, in Devlin's (1956) words, as "a little parliament". What this means is that the jury has a role to play in the formulation of new norms for society and does not just judge upon existing ones. Michael Freeman (1981) enumerates this function well and goes through, with characteristic thoroughness, the various ways in which this function is expressed and some of the theories behind it. He shows how the jury mediates between the Law and the people and how, right up to the present time, it has acted in defiance of established norms, exercising the right of jury "nullification".

juries may and do infuse "non-legal values" into the trial process. They are the conscience of the community; they represent current ethical conventions. They are a constraint on legalism, arbitrariness and bureaucracy. (p. 88)

Freeman gives a long list of examples of the jury exercising this role. I will only mention one, which comes from the jury research of McCabe and Purves, quoted by Freeman.

(an Indian hot-dog salesman) was provoked by a number of louts and wounded one of them. The judge expressly directed the jury that provocation was no defence. They returned a verdict of "not guilty". What they were saying is that provocation ought to be a defence not merely to charges of murder and in saying this they would have the support of the bulk of the population. (p. 92)

This also brings to the fore the normative character of truth-finding procedures. For the way we set about finding the truth will also determine in part the truth that we get. We cannot separate them, and have to ask ourselves not the meaningless question, "does it tell us the truth?" but rather, "do we want a fact-gathering procedure that will produce results such as the one above?"

I end this section by showing how this does not undermine legality, the principle upon which our society is based, but rather is an integral part of that principle. Democratic liberty is instantiated in our society by notions of the "rule of law" or "government of laws and not men". This is taken to mean that people are entitled to do what they want as long as they do not transgress the rules which have been set up beforehand to guide their conduct and to prevent "boundary" disputes. This then is justice according to the law. As we can see, it sets a great premium on legal certainty, the knowledge that

there is a fair and just procedure for applying a general rule to a particular case. But how can we find this and what are the actual practices through which this is achieved in liberal States?

Rules cannot, by themselves, determine all possible outcomes since there is a limit to the guidance general language can provide. We cannot frame a rule which will cover all possible outcomes definitively and if, to counter this, we frame a very vague rule then how are we to know that it applies to the particular case? If, in answer, we reason purposively and determine the meaning of a rule from its purpose or intention and not by what it literally says, then we can lose sight of the point of having a system of general rules set up beforehand in the first place. For the rules themselves are not as important as the determination of their functions. One cannot stop this malaise by saying that this applies only to rules that are on the face of it unclear, for that itself is a purposive judgement. But this seems to negate the purpose of legality. It leaves us with no objective solution and a mess of subjectivity. How can we tell, in any rational and objective way, what the purpose of any particular rule is and thus recover the intersubjectivity that legality tried to bring us? One way is to view the system as a whole and allow determinations which have a coherent "fit" with the whole system. This way of achieving objectivity places a stress on the reflective equilibrium of the judicial personnel themselves. It implies a fixed socialized cohort who, by working in the system continually, will be a guarantee of intersubjectivity. The emphasis is on professionalism and professional skills and the delimitation of that cohort by these. So, in practice, the liberal ideal of "government of laws and not men" becomes the government of a small group. In this view lay participation, such as that of lay magistrates, juries and the like, is anomalous since it disturbs the basis for objectivity and predictability. These groups do not possess the skills required nor the necessary socialization, and so decisions stemming from them will tend to be uncertain and unpredictable.

I have looked at the sociological basis of this, in respect of lay magistrates, elsewhere. Here we can see the contradiction in a liberal democracy instantiated in the rule of law. For in order that the main moral imperative of that society, "the government of laws and not men", may flourish, another important value, that of participation must, in part, be negated. One can see this in the tension between efficiency and democracy where efficiency, in the shape of speed, reliability and constancy is seen as continually subverted by the demands of democratic, and therefore inefficient participation. It is institutions like the jury which manage this tension in our society, by providing participation within the framework of the "rule of law" and thus not damaging the main moral imperative of the system. This

is how in practice the rule of law works and what a system of organization based on it means - the tension between the "efficiency" of the legal experts and the "democracy" of lay people. Looking at it in this way we can also see the ideological dangers of some of the jury studies. They celebrate the idea of the expert, of efficiency as against democracy.

(8) THE ADVERSARY SYSTEM AND FORMS OF SOCIETY

So far I have given an epistemological account of what I have called truth-certifying procedures. Within this framework I have looked at the adversarial trial system and the part which the jury plays in it. I have argued that the part the jury plays does not subvert the idea of a society based upon legality. Rather it is an integral part of that society and that is how the rule of law in practice operates. My account stressed the part that normative criteria play in choosing which sort of truth-certifying procedure to adopt. One cannot judge truth-certifying procedures by the results of other ones unless one has a criterion by which one can judge that they are better. Thus the point of my argument has been to say that "better" in this context does not mean more efficient at getting at the truth because we can never really say that. Rather, it is a mixture of that and political, moral and pragmatic criteria.

I have tried to justify the role of the jury within a particular truth-certifying procedure; it now falls to me to look at the normative justifications of that procedure as a whole. We can better see the justifications if we compare the "fight" theory with the model that Frank thought was better, as being "the disinterested pursuit of truth", that of the inquisitorial system. Frank held that here there was a search, by all, for what actually happened, with the judge playing an active part and not just holding the ring for a clash of opposing views. My concern here is not whether actual inquisitorial systems, which are to be found mainly in civilian jurisdictions, measure up, even in theory, to this model. What I am concerned with is the logic and the image of the opposing systems.

How, in the first place, should we look at the adversarial system? We could view the procedure as part of the "marketplace" of ideas, the strongest being the winners; a Darwinian theory, one might say, of how to arrive at the truth. Put this way it does not sound a particularly attractive way of arriving at a view of reality. It seems rather, an instantiation of the principle that "might is right" and not a promising candidate for the justification of our truth-certifying procedure. Is the image of the fight to be viewed in such a way? One must be careful not to fall into the trap of believing that because the procedure has what seems to be a competitive edge then the procedure itself must be morally suspect. It is possible to believe that a market

society, where everyone strives to fulfill their own self-interest, is morally unworthy but that does not imply that all competition is bad. There is nothing necessarily wrong with wanting to be faster, stronger, than the next person and competing with them to find out. What is wrong, at least from the point of view of certain theories, is using competition as means of distributing the social product. That one is against the latter does not imply that one should be against the former. The adversarial system is not a competitive system for distributing the social product but a method for generating the "facts of the matter". As such we must look at the idea of fight and competition in a different light.

One of the important things about the adversarial procedure is its concentration on oral argument and presentation. All evidence, it can be said, has to be related to some oral testimony. Now what this means is that evidence is tested not just through one medium but also through the cut and thrust of oral debate and argument and often falls to be justified in face-to-face confrontation. Even accepting all the psychological and sociological evidence about the role of witness presentation, one can still say that demeanour forms, and should form, an important part in judging the credibility of witnesses. The inquisitorial system, on the other hand, concentrates much more on written evidences and thus, it seems to me, loses a vital aspect in the testing of evidence. An analogy that makes this point well can be taken from the academics. In the British universities at least, what is judged as a good seminar is one where there has been a "good" discussion, where the cut and thrust of debate has taken place and where all statements have been subjected to searching oral criticism. To continental eyes, used to an orderly progression with interventions being made serially without interruption, this often appears a shouting match rather than the pursuit of knowledge. It is this kind of process of oral argument and justification which the "fight" is really about.

A common criticism by British lawyers of the inquisitorial system is that it gives the State too much power. Since it is supposed to be a disinterested search for truth, the organizational form the institution takes is to be part of the civil service, and judges become civil servants trained in the skills of fact-finding. This is controlled through a "ministry of justice", or something similar, which gives political control of the system. Coupled with the idea of the search as being a rational and objective one, this gives great power to the State and enables other views of the matter to be more easily overridden. The British system, it is argued, at least gives everyone a chance. Now, as we have seen, this vision of the adversarial system is not really true in practice and the reality is often as State-dominated and one-sided as we are led to believe the continental system is. Recently, for example, government

forensic experts have been discredited and their testimony has been shown not to have been completely accurate, yet for years they have been accepted as "disinterested scientists". In general, however, it is claimed that there is more of a possibility to challenge and present other views of reality. It presents the possibility of change whereas the inquisitorial system, in theory at least, is wedded to a particular ideology of stability.

Frank himself saw the adversarial system as capitalist in the following manner:

"Classical" *laissez-faire* economic theory assumed that, when each individual, as an economic man, strives rationally, in the competitive economic struggle or "fight", to promote his own self-interest, we attain public welfare through the wisest use of resources and the most socially desirable distribution of economic goods. The "fight" theory of justice is a sort of legal *laissez-faire*. It assumes a "litigious" man, it assumes that, in a law suit, each litigious man, in the court-room competitive strife, will, through his lawyer, intelligently and energetically try to use the evidential resources to bring out the evidence favourable to him and unfavourable to his court-room competitor; that thereby the trial court will obtain all the relevant evidence; and thus, in a socially beneficial way, the court will apply the social policies embodied in the legal rules to the actual facts, avoiding the application of these rules to a mistaken version of the facts. Legal *laissez-faire* theory therefore assumes that the government can rely on the "individual enterprise" of the individual litigants to ensure that court orders will be grounded on all the practically available relevant facts. (1973 p. 92)

No doubt "*laissez-faire* theory" was contrasted unfavourably with the theory which posited the rational distribution of the social product by disinterested experts. If political history has taught us anything then it is that great unfreedom has been generated by experts who act in the name of the community.

It can be argued that the adversarial system implies greater criteria of relevance than the systems Frank was arguing for. Within the limits of the system, what is relevant is what the parties to the case choose to bring up. Of course, this situation does not always obtain. In practice, parties do not have equal power and the rules of relevancy and evidence are not always evenhanded, some avenues can be unfairly blocked off and some can be unfairly opened. Looking at the system sociologically, one might say that it is so constructed as to give power to the State and the powerful and that the rules which have grown up around it tend to support that. Nevertheless, there are within it the theoretical possibilities of a much wider system. One can see within it something of the "ideal speech situation" of Habermas (1985), and the seeds of a forum where what happened and what is to be done are determined conjointly by all those in the community who are interested.

That sort of forum implies, of course, a different sort of society, a more participatory, or, as some would argue, more socialist society. It is not my intention in this paper to argue for or against different forms of society; I merely wish to show that the logic of the adversarial system need not be that of capitalism, as Frank assumed, but could also fit into more socialist societies.

To get back to the present. The form of the adversarial system which exists in our society is one which only allows a certain level of participation and is, as I have shown, appropriate for a society where the "rule of law" is supposed to obtain. There are also, as we have seen, certain trends which tend to reinforce the power of the State and the powerful. Now the jury can be seen as an institution which fits into the logic of the adversarial system as it appears in our liberal society and can be justified within the terms of that society.

The jury can also be seen as a transitional institution, representing the reality of the "fight" and the possibility of a forum where all interested parties determine what happened and what is to be done. In this way it can prefigure the form of a "fight" system appropriate to a more participatory society.

I finish my paper with some remarks on the composition of the jury. It is here that the idea of the jury as an institution appropriate for a liberal society and as something representing different forms can get conflated, especially when the jury becomes a political battlefield. There have, recently, been numerous scandals concerning jury vetting where the State has tried to ensure that those who are on the jury will not be inimical to its own interests. Against this, a jury picked at random from the community has been put forward as the very idea of the jury and this has also been taken up by some on the left. There are a number of points to be made here. Firstly, this is not historically accurate and jurors have been selected from a very narrow base, the property qualification only being abolished comparatively recently. Secondly, what is the community in this contest? Many defence lawyers have wanted juries which seem to go against the randomness principle because they have claimed that their accused should be judged by his or her particular community. Thus there have been pleas for all-black juries or juries selected from certain areas as being best able to determine what is going on. And this also throws into question the notion of randomness. For how can we select people at random without having some idea at least of the populations from which we are going to draw our sample? And once we look into the social survey literature on sampling and randomness we can see the immensity, if not impossibility, of the task? Thirdly, the idea of randomness suggests a form of "scientific impartiality"

in looking at and judging the evidence. Just as the greatest sin in science is experimenter bias, which must be guarded against by double-blind experiments and the like, so the juror must guard against his bias by being a stranger to the people participating in the drama he is judging. He must have no prior knowledge of the people and events nor must he have characteristics which put his status as impartial observer into question. But this view only came about with the rise of science and, as I have argued, is not the only view possible. I am not going to suggest a solution to this question. What I want to suggest is that this area is one that is essentially problematic and should remain so. For at stake in arguing for or against different forms of jury selection are different notions of community and representation and the composition of the jury is the battleground where this can be fought out. One should not think of random selection as an answer, for that itself is one of the notions of community at stake in the struggle. The idea of random selection seems to me to imply two things: first of all, a belief in the scientific method and the value of impartiality. Secondly, it rests on a notion of community, the key to which is difference; a society where people are atomic individuals who go about their own ends, united only through institutions like the market, which make their private actings into a sort of common venture for the good of all, and through the formal and abstract rules of the law which define the boundaries of their activities in order to prevent them from encroaching on others. The "communion of peers" of the randomly selected jury ideologically celebrates this unity in disunity.

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HERMENEUTICS AND NARRATIVE COMPREHENSION

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1. In order to provide a not too narrow approach to the issues of narrative comprehension and coherence in the context of practical experience, and more specifically to the procedures of argumentation and justification to which the contemporary debate on legal reasoning has attributed the names of "narrative coherence" and "normative coherence", it is necessary to insert the issues in a broader, more comprehensive perspective.

Following in the footsteps of those illustrious philosophers and jurists, from Gadamer to Betti, from Ricœur to Dworkin, who have repeatedly put forward the appealing "game" of grasping common aspects, analogies and differences between legal, historical and literary interpretation, we identify that broad perspective, able to guarantee us a not too circumscribed approach to the problem, with a formulation of the issues of understanding and narrative coherence from a hermeneutic viewpoint.

In this perspective, having discarded the first temptation of resolving (and hence dissolving) the problem in a multiplicity of limited, specialized approaches aimed at throwing light on reciprocal and referential relationships among diverse interpretive models, one question peremptorily emerges: Is there anything in common (and if so what) to the interpretive procedures of the historian, literary critic and jurist, for all the obvious diversity and specificity of their tasks and of the objects on which they perform their interpretations?

2. What proves to be common to the various practices and operations of understanding lies precisely in the strongly hermeneutic nature of the problem: it consists in each case of an appropriation of that which is strange, in a struggle against distance in both space and time, in creative reproduction of the original production, through a critical actualization of the meaning

within the conditions set by a new cultural situation.¹ Every linguistically transmitted objective datum (whether a historical event, a literary work or a legal norm), every type of text, requires in order to be understood a transposition that always necessarily takes the form of a mediation between past and present. Being constitutionally based on the dialectic tension between otherness and appropriation, every hermeneutic operation is rooted in a linguistic understanding of the world that precedes it. The interpreter, as Hans Georg Gadamer has shown, "belongs" to the text:² which means not only that in the understanding of a text (as an attempt to bring it out of the obscurity of the past and make it present and familiar) not only is it impossible to eliminate precomprehension,³ i.e. the fact that the anticipations of meaning produced by the interpreter constitute an integral part of the meaning to be interpreted, but also the fact that access to the text can come about only through the *intermediation* of language and of historical transmission, a conditioning one cannot escape from.

This recognition of the fact that every interpretation cannot be other than rooted in a preliminary basis of understanding to which it is subject can undoubtedly be useful in resolving one focal point of the epistemological debate on hermeneutics, specifically the problem of the alternative and the conflict between the universality and the scientiality of hermeneutics. We cannot here dwell on the famous debate between, on the one hand, those (like Gadamer and Bubner) who laid the emphasis on the universality of hermeneutics to the detriment of its scientiality⁴ and those who (like Haber-

¹ On the hermeneutic problematic of "distance" and "appropriation", cf. H.G. Gadamer, *Wahrheit und Methode, Grundzüge einer Philosophischen Hermeneutik*, Tübingen, Mohr 1974, pp. 275 ff., 415 ff., "Vom Zirkel des Verstehens", in *Kleine Schriften*, IV, Variationen, Tübingen, Mohr 1977, pp. 60 ff., Italian trans. F. Vercellone, in *Aut Aut* 1987, no. 217-218, pp. 19 ff.; P. Ricœur, "Qu'est-ce qu'un Texte? Expliquer et Comprendre", in *Hermeneutik und Dialektik Aufsätze II*, edited by R. Bubner, K. Cramer, R. Wiehl, Tübingen, Mohr 1970, pp. 181-200; "Logique Herméneutique?", in *Contemporary Philosophy. A new survey*, I, The Hague, M. Nijhoff 1981, pp. 179-223.

² *Wahrheit und Methode*, *op. cit.*, pp. 312, 434; "Text und Interpretation", in *Text und Interpretation*, edited by P. Forget, Munich, Fink 1984, pp. 24-55.

³ *Wahrheit und Methode*, *op. cit.*, pp. 250 ff., 278, Italian trans. *op. cit.*, pp. 312 ff., 344, *Vom Zirkel des Verstehens*, *op. cit.*, pp. 56 ff.,

⁴ Gadamer, "Rhetorik, Hermeneutik und Ideologiekritik. Metakritische Erörterungen zu 'Wahrheit und Methode' in *Hermeneutik und Ideologiekritik. Theorie-Diskussion*, Frankfurt a.M., Suhrkamp 1975, pp. 57-82; "Die Universität der hermeneutischen Probleme", in *Kleine Schriften*, I, Tübingen, Mohr 1976, pp. 101-112; R. Bubner, "Über die Wissen-

mas and Apel) instead stressed its scientiality at the expense of its universality.⁵ Suffice it to say that once one is, with Paul Ricœur, convinced of the complementarity rather than alternativeness of *Hermeneutik* and *Szientistik* in philosophical hermeneutics, between *truth* and *method* in the epistemological act⁶ - once it has been recognized that any scientific knowledge, as being historically transmitted formation of meaning, irreducibly implicates the subject in a previous context of linguistic affinity transmitted by tradition (or else implicitly presupposes, as Karl Otto Apel says, the existence of a community of communication) - then the universality of interpreting is beyond discussion. There still remains the problem, definitely not a secondary one, of reconciling this universality with scientiality and thereby making possible and objective the explanatory procedures which in the various fields of research are applied to any transmitted content whatever.

In other words, strengthened by an awareness of the profound unity of the overall process of understanding that can prevent us from reducing hermeneutics to a mere auxiliary function, a technical *Kunstlehre* in the scientific exegesis of texts,⁷ it is now appropriate to return to a "regional" examination, however summary. This will go into the distinct role played by hermeneutics in the various specialized scientific areas of historical, literary and legal interpretation, in order to bring out the partially divergent meanings that the problem of "narrative comprehension" takes on in each of them.

schaftstheoretische Rolle der Hermeneutik", in *idem*, *Dialektik und Wissenschaft*, Frankfurt a.M., 1973, pp. 89-111; "Was ist kritische Theorie?", in *Hermeneutik und Ideologiekritik*, *op. cit.*, pp. 160-209; *Modern German Philosophy*, Cambridge, Cambridge University Press 1981, pp. 51 ff.

⁵ J. Habermas, "Zur Logik der Sozialwissenschaften", in *Philosophische Rundschau*, Beih. 5, Tübingen, Mohr 1967; "Der Universalitätsanspruch der Hermeneutik", in *Hermeneutik und Dialektik, Aufsätze*, I, edited by R. Bubner, K. Cramer, R. Wiehl, Tübingen, Mohr 1970, pp. 73-103; "Urbanisierung der heideggerschen Provinz", in Habermas, *Philosophisch-politische Profile*, Frankfurt a. M., Suhrkamp 1981, pp. 392-401; K.O. Apel, *Transformation der Philosophie*, vol. 2, Frankfurt a.M., Suhrkamp 1976, pp. 96-127.

⁶ P. Ricœur, *Logique Herméneutique? op. cit.; Exegesis. Problèmes de méthode et exercices de lecture*, Neuchâtel, Delachaux et Niestlé 1975, pp. 53 ff.; "Herméneutique et critique des idéologies", in *Archivio di Filosofia*, 1973, pp. 25-61; G. Zaccaria, *Ermeneutica e giurisprudenza. I fondamenti filosofici nella teoria di Hans Georg Gadamer*, Milan, Giuffrè 1984, pp. 73 ff.; "Positivismo ed ermeneutica nell'epistemologia giuridica contemporanea", in *Riv. trim. dir. proc. civ.* XL (1986), no. 3, pp. 946 ff.

⁷ On this aspect of hermeneutics, see esp. P. Szondi, *Einführung in die literarische Hermeneutik. Studienausgabe der Vorlesungen*, 5, Frankfurt a.M., Suhrkamp 1975.

3. There is no doubt at all that the historian's task *too*, being characterized on the basis of a work of mediation between the original meaning and the present one of events, presents itself as an eminently hermeneutic activity⁸. In the case of historical knowledge *too*, and *especially*, the transposition to another viewpoint, another culture, that underlies that type of knowledge calls for the overcoming of a historical distance, a merging of the timeframes of different epoches, establishing the continuity between past and present. There is no constructed or preconstituted interpretive model nor general rule for elaborating hypotheses of universal regularity (the "nomological" model) that ought not to be measured against the gap represented by the practical contingency of the historical events, i.e. the fact that those events, as having to do with human agents and not physical entities, could have happened differently.⁹ Indeed, it may be added that it was precisely this need, to overcome the constitutive obstacle of the otherness and strangeness of past events, that marked the first, most customary and traditional definition of history, as knowledge of the actions of men of the past. The famous, wide-ranging epistemological debate among the various theories on the logical and epistemological status of historical knowledge (from *histoire événementielle* to the analytical philosophy of history, from the "nomological" model to the "narrativist" theses¹⁰) has brought the simplicity of this starting-point progressively into crisis, and considerably "complicated" it. Unfortunately, the complex evolution of that debate, the different positions (from French historiography to neopositivist epistemology, from anti-positivist philosophy of history to the theories of casual analysis) which are nothing other than different solutions to the problem of the relationship between history and account, between explanation and understanding, cannot be gone further into here, or even set out adequately. I must content myself with referring to Ricœur's masterly analysis in the first volume of *Temps et récit*¹¹ and with outlining a few aspects that are essential for the purposes of our topic.

⁸ *Wahrheit und Methode*, p. 310.

⁹ Ricœur, *Temps et récit*, vol. 1, Paris, Seuil 1983, pp. 138 ff.

¹⁰ C.G. Hempel, "The Function of General Laws in History", in *The Journal of Philosophy*, 39 (1942), pp. 35-48; W. Dray, *Laws and Explanation in History*, Oxford, Oxford University Press 1957; A. Danto, *Analytical Philosophy of History*, Cambridge, Cambridge University Press 1965; W.B. Gallie, *Philosophy and the Historical Understanding*, New York, Schocken Books 1964.

¹¹ *Temps et Récit*, *op. cit.*, p. 137 ff.

Undeniably, the historian's intention cannot be other than to describe and explain what actually happened, in all its concrete details. By definition, the historical event is what actually took place in the past, as an unrepeatable singularity: the event is what takes place once only.¹²

In this sense, there are certainly grounds for the recognition that one specific characteristic of historical interpretation is the claim to truthfulness it advances, whereby history claims to deserve the title of a "true" story.¹³ But there are just as good grounds for the observation that if the historical event were understood as an *unicum*, absolutely irreducible, in metaphysical terms, to any other event, explanation in the context of historical narrative would become impossible.¹⁴ But since 1938, with Raymond Aron's *Introduction à la philosophie de l'histoire*,¹⁵ later followed by H.I. Marrou's *De la connaissance historique* (1954),¹⁶ it has definitively become clear that since the historian is profoundly involved in the understanding and explanation of past events, his understanding, far from being able to aspire to reactualization of the past, will always, and necessarily, present itself as a reconstruction of events, in which the initiative of research belongs not (as the methodology of positivism maintained) to the document, but to the questions raised by the historian himself.¹⁷ If, then, it is not unreasonable to recognize the coincidence there is between explaining why something happened and describing what did happen,¹⁸ so that the writing of history, far from being a secondary operation, should be regarded as the constitutive fac-

¹² *Temps et Récit*, *op. cit.*, p. 139.

¹³ P. Veyne, *Comment on écrit l'histoire*, Paris, Seuil 1971.

¹⁴ Ricœur, *Temps et récit*, *op. cit.*, p. 177.

¹⁵ R. Aron, *Introduction à la philosophie de l'histoire: Essai sur les limites de l'objectivité historique* (1938), Paris, Gallimard 1957.

¹⁶ *De la connaissance historique*, Paris, Seuil 1954.

¹⁷ Fundamental in this connection is R.G. Collingwood's *An Autobiography*, (1939), Oxford, Oxford University Press 1978, on whose "logic of question and answer" cf. Gadamer, *Wahrheit und Methode*, *op. cit.*, pp. 351 ff.

¹⁸ Ricœur, *Temps et récit*, I, *op. cit.*, p. 210.

tor in the historical mode of understanding,¹⁹ then we may say that the historian's work, undoubtedly very complex, is composed and takes form from a series of activities, mutually interconnected and not easily distinguishable, that range from explanation to description, from reconstruction to generalization, from conceptualization to the sequencing of events. But in any one of these aspects, which for all their undoubted specificity are manifested and are produced in a richly woven tapestry that resists rigid analytical breakdown, the necessary and determining factor in historical knowledge is interpretation, that is, the phase in which the historian selects and assesses events, that is, attributes meaning and value to them.²⁰ This is not merely because, as Paul Veyne has effectively pointed out, since every event is "as historical as every other, the fields of events may be cut up completely freely",²¹ but also because history can be called knowledge only in virtue of the relationships set up between the past as lived by men in other times and the historian of today. This relation, never able to take the form of direct perception but rather that of selective reconstruction, ordering and attributing links of cause, meaning and value to a past which when it was present must, just like our present, have been multiform, ambiguous and not fully intelligible,²² takes the form of an essentially hermeneutic mediation.

If, then, historical research is constitutively identified by the hermeneutic relationship between the historian and the past, it becomes essential to deepen the analogy - which at this point forces itself on our attention and therefore needs to be made explicit - between the historian's argumentative procedure and legal argumentation.

Explaining means for the historian defending his interpretive hypotheses against opposing or different theses based ideally or in fact on a set of diverse elements (for which reason he must ratify his procedure and theses with a series of elements: supporting documents, evidence, etc.), which uphold him. Not too differently, the judge in the phase of *Rechtsfindung* faces the problem of weighing the respective relevance of norms and facts to be interpreted

¹⁹ M. de Certeau, *L'Écriture de l'histoire*, Paris, Gallimard 1975; H. White, "The Historical Text as Literary Artifact", in *The Writing of History*, edited by R.A. Canary, II. Kozicki, Madison, University of Wisconsin Press 1978, pp. 41-62.

²⁰ C. Frankel, "Explanation and Interpretation in History", in *Theories of History*, edited by P. Gardiner, New York, The Free Press 1959, pp. 408-427.

²¹ P. Veyne, *Comment on écrit l'histoire*, op. cit., p. 83.

²² Ricœur, *Temps et récit*, I, op. cit., p. 142.

for the purpose of choosing the final decision for the case in question. In both cases, we have to do with acts of judgement which, since they have to prove and argue why one particular explanation (or particular interpretive solution) is preferable to others, have to defend themselves against potential or actual refutation by supporting themselves on "guarantees" consisting of proofs, documents and testimony.²³

There are at least two important differences, however. On the one hand there is the composition of the audience to whose judgements the various justifications and arguments will be subjected: the scholarly community of competent persons in the case of the historian, and all those concerned in the case of the judge. On the other is the nature of the subjects to whom the judgement refers. While in the case of judicial interpretation the judgement refers to actions carried out by identified subjects, responsible for those actions, in the historian's interpretation these subjects may instead not be identified, but merely entities that are, in the etymological sense, anonymous (like societies, civilizations, social classes, nations, cultural aspects or mentalities).²⁴

4. Having reached this point, we may sketch out some first provisional conclusions, in connection specifically with the problem of historical interpretation. If the analogy we have set up between historical argumentation and legal argumentation has allowed us, however indirectly, to identify the presence in the judge's procedure of an activity of historical nature aimed at defining such facts in their historical individuality and taking a position on them,²⁵ then history, by its characteristic of reconstructing the field of practical experience, has to be called on to make the truth-claim advanced by it compatible with the technique of narrative comprehension with which it is at the same time indissolubly linked. This link of derivation between history and narrative comprehension may indeed, as Ricœur has

²³ On the problem of *warrants* in legal argumentation cf. H.L. Hart, "The Ascription of Responsibility and Rights", in *Logic and Language*, ed. A. Flew, vol I, Oxford, Basil Blackwell 1952, pp. 145-166.

²⁴ Ricœur, *Temps et récit*, I, *op. cit.*, p. 249.

²⁵ E. Opocher, *Lezioni di Filosofia del diritto. Il problema della natura della giurisprudenza*, Padua, Cedam 1953, pp. 5, 108. On the relationship between the judge's activity and the historian's, cf. P. Calamandrei, "Il giudice e lo storico", in *Studi sul processo civile*, V, Padua, Cedam 1947, pp. 27-51.

taught us in *Temps et récit*, be gradually reconstructed using an adequate method.²⁶

As a written text, even a literary text presents anyone aiming at understanding it in its otherness with the task of conquering the abyss of its silence and its strangeness. More exactly, it might be said that the otherness between the one who produced the text and the one who is receiving it, the distance between the author's past and the reader's present and between their differing cultures, can never be given in absolute form, since absolute strangeness would mean unrecognizability, and therefore that inability to gain access to the meaning intended by the text that entails incomprehensibility.²⁷ The laborious process of interpretation is always exposed to the risks of incomprehension and failure.

The "miracle" of literary interpretation - as Hans Georg Gadamer has well emphasized²⁸ - lies precisely in transforming into something familiar and close, something present and "one's own", which, if not mediated by the intermediary interpreter to make the non-understood comprehensible, would appear as irredeemably obscure, distant and remote. This does however mean profoundly changing the concept of text,²⁹ giving it hermeneutic connotation, and in any case a broader extension than thought about the methods of the philological disciplines seems prepared to.³⁰

Contrary to what was stated by a long tradition, particularly effective in the 19th century but present in our own too, that hermeneutics and literary criticism on the one hand and hermeneutics and philology on the other ought to be regarded as disciplines that are certainly related, but quite independent of

²⁶ Ricœur, *Temps et récit*, I, *op. cit.*, p. 133.

²⁷ H.R. Jauss, "Il principio dialogico nella critica letteraria" *Lettera Internazionale*, 4 (1987), no. 12, p. 38. For the aspects and problems common to literary criticism and philosophical hermeneutics see P. Ricœur, "Die Schrift als Problem der Literaturkritik und der philosophischen Hermeneutik, in *Sprache und Welterfahrung*, edited by J. Zimmermann, Munich, Fink 1978, pp. 67-88.

²⁸ *Wahrheit und Methode*, *op. cit.*, p. 156. On the relationship between literary, theological and juridical hermeneutics cf. *Text und Applikation. Theologie, Jurisprudenz und Literaturwissenschaft im hermeneutischen Gespräch*, edited by M. Fuhrmann, H.R. Jauss and K. Pannenberg, Munich, Fink 1981.

²⁹ *Text und Interpretation*, *op. cit.*, p. 31.

³⁰ *Text und Interpretation*, *op. cit.*, pp. 30 ff.

each other,³¹ contemporary hermeneutic thought has definitively established that both the philological reconstruction of a text and its grammatical and critical explanation are always *also* interpretation.

And it is not always the text handed down that guides interpretation: often it is more the interpretation that acts as guide to the critical establishment of the text.³² Hermeneutics and philology, understanding and criticism are interdependent, and mutually correct and confirm each other.³³ The philological work of intervention and restoration on a text, and the critical work of decipherment and assessment of its meaning, cannot possibly not take the form of, and proceed on the basis of, a certain interpretation of the text, which is much more than a mere technique of exegesis, even if - as is obvious - it cannot do without the *ars interpretandi*.³⁴

What is constitutive of any reading is, as said above, the presence of the non-contemporaneous.³⁵ Reading is not a mere lining up of one word with another: it is more a silent way of making something written speak again, which presupposes anticipations of understanding that exceed the verbal totality of the text. Accordingly, literary comprehension too, like any other form of comprehension, is formed, apart from the "pre-set" structure of understanding, by the dialogical search for meaning. According to Gadamer's revised version of the Platonic model, this develops in accordance with a dialectic of question and answer in which the problematic openness that characterizes genuine, "educated" hermeneutic knowledge has the structure of questioning oneself: that is, of putting one's own opinion on the text to the test by measuring it against others' opinions.³⁶

But even if it too presupposes capacity for dialogue with a text remote in time, and consequently an openness to the manifold possible opinions of

³¹ Szondi, *Einführung*, *op. cit.*, p. 38.

³² Gadamer, *Text und Interpretation*, *op. cit.*, pp. 34 ff.

³³ Szondi, *Einführung*, *op. cit.*, p. 38.

³⁴ Szondi, *Einführung*, *op. cit.*, pp. 12, 24-25.

³⁵ Gadamer, "Sentire è un po' capire", in *Rinascita*, 16 June 1987, no. 22, p. 21.

³⁶ Gadamer, *Wahrheit und Methode*, *op. cit.*, pp. 351-52. On the hermeneutic logic of question and answer, see Zaccaria, *Ermeneutica e giurisprudenza* *op. cit.*, pp. 40 ff.

others, literary interpretation³⁷ has a specific feature that cannot readily be compared with any other object of linguistic transmission. This is not only because a reading of a literary work raises the problem, absent from conversation, from *viva voce* talking and listening,³⁸ of constantly paying attention to the unity and to the totality of the meaning of the text.³⁹ It is also because, as pointed out as long ago as the 18th century by Chladenius and reaffirmed in the 20th by Betti's theory of interpretation and Szondi's literary hermeneutics,⁴⁰ literary interpretation lacks the dogmatic, normative character proper to other types of hermeneutics, such as the theological and the legal variety; while instead there is, much more markedly, present a link with aesthetic conceptions which is entirely peculiar to literature.⁴¹ While for legal texts application is an essential element in making their normative value actual, the "normative" character of the interpretation of a literary text is instead quite special. The "prescription" of a literary text or poetical work refers neither to an original normative discourse nor to the interpreter's intention, but springs from its intimate nature, which induces the reader to follow a path, moving from its perimeter.⁴²

This is, indeed, more exactly, one of the useful and necessary criteria for distinguishing the specific feature of literature: the capacity of literary lan-

³⁷ On the questions of literary interpretation and textual philosophy see D. Freundlieb, *Zur Wissenschaftstheorie der Literaturwissenschaft. Eine Kritik der transzendentalen Hermeneutik*, Munich, Fink 1978; E. Leibfried, *Literarische Hermeneutik. Eine Einführung in ihre Geschichte und Probleme*, Tübingen, Narr 1980.

³⁸ On the problematic of conversation and dialogue see R. Spitz, *Vom Dialog*, Stuttgart 1976; P. Lorenzen, K. Lorenz, *Dialogische Logik*, Darmstadt 1978; AA. VV., "La conversation", in *Communications XXX* (1979); *Dialogizität*, edited by R. Lachmann, Munich 1982.

³⁹ *Wahrheit und Methode*, *op. cit.*, p. 153.

⁴⁰ Johann Martin Chladenius, *Einleitung zur richtigen Auslegung vernünftiger Reden und Schriften* Leipzig 1742, b 2. b 3, Neudruck, Düsseldorf, Stern Verlag, 19; E. Betti, *Teoria generale dell'interpretazione*, II, Milan, Giuffrè 1955, chaps. VIII-IX; Szondi, *Introduzione all'ermeneutica letteraria*, *op. cit.*

⁴¹ *Estetica ed ermeneutica. Scritti in onore di Hans Georg Gadamer*, edited by R. Dottori and H. Künkler, Naples, Pironti 1981; H.R. Jauss, *Ästhetische Erfahrung und literarische Hermeneutik*, Frankfurt, Suhrkamp 1982.

⁴² Gadamer, *Text und Interpretation*, *op. cit.*, p. 47.

guage to evoke an objectivity that is independent of the real world. In literature the structure of meanings supported by the text does not refer to real referents and circumstances. The circumstances evoked by the text have instead a peculiarly unreal nature, or at any rate one fundamentally independent and distinct from that of reality.⁴³ Especially in the modern culture of the contemporary West, the "reappropriation" of this ideal world evoked by the text is permeated, more than in terms of "application" of the legal and theological type, by a radical doubt on the part of the reader in his intimate colloquy with the literary text: a doubt that sometimes amounts to a painful distancing.⁴⁴ Another criterion that might usefully be employed for distinguishing literature (which, combined with the foregoing one, allows us to go deeper into the theme of "narrative coherence") is bound up with the peculiar nature of the language through which words and phrases contained in the literary text take on unity. It is precisely in virtue of *that* literary language (and not any others) that everything evoked by the literary work becomes an irreducible unity. The objectivity (*Gegenständlichkeit*) of the text, including of course characters, feeling and events described or merely even alluded to in it, is so unitary that the world evoked by the literary work, and the work itself, would become something different if even only a little of the irreducible unity of the language were changed (like the sounds, the accents, the pauses, the length of the sentences).⁴⁵

At root, being in fact enigmatic and inexplicable, though not arbitrary, the unrepeatable "form" of the work of art, as clarified in exemplary fashion by a master of contemporary hermeneutics, Luigi Pareyson,⁴⁶ is to be understood as an "organism, living a life of its own and equipped with an internal legality: a totality, unrepeatable in its singularity, independent in its autonomy, exemplary in its value, enclosed and open at the same time, in its definiteness which encloses an infinity, perfect in the harmony and unity of

⁴³ W. Kayser, *Das sprachliche Kunstwerk. Eine Einführung in die Literaturwissenschaft*, Berne and Munich, Franke Verlag 1978, p. 13.

⁴⁴ Ricœur, *Logique herméneutique*, p. 195.

⁴⁵ W. Kayser, *Das sprachliche Kunstwerk, op. cit.*, p. 14.

⁴⁶ Esp. in *Estetica. Teoria della formatività*, Florence, Sansoni 1974, pp. 59 ff. Apart from this work, Pareyson's aesthetic theory is systematically set out and developed in the works *Teoria dell'arte*, Milan, Marzorati 1965, *L'esperienza dell'arte*, Milan, Marzorati 1974. On the ontological foundation of art in Pareyson, see G. Vattimo, *Poesia e ontologia*, Milan, Mursia 1967, pp. 76 ff.

its law of coherence, whole in the mutual adjustment between the parts and the entirety".⁴⁷

The intrinsic and essential character of this "form" is its being the successful result of the dynamic process of invention and production by the author. The interpreter who wishes to grasp its value must treat it as "formed form" and at the same time "formant";⁴⁸ that is, he must on the one hand make his own the unitary law and intimate constitutive form that govern its structure, but on the other he must be constantly aware of the fact that the uniqueness of the work lives inseparably in the multiplicity and the insuperable personality of diverse interpretations. In this way the work becomes bearer of a law that is born with it, nevertheless transcends it and judges it.⁴⁹

Even if the distinction between author and interpreter may be regarded as more a question of distinguishing different aspects in one and the same process, literary interpretation does require specific, special characteristics such as acuity, penetration, methodical enquiry and critical capacity for judgement.⁵⁰

5. Nevertheless, while all these characteristics would seem at least in part to take literary interpretation further away from the characteristics of legal interpretation, there are other elements that tend to bring them closer together. Indeed, it is interesting to note how, in parallel with the renewal and development of literary hermeneutics in Germany by Hans Robert Jauss and Wolfgang Iser,⁵¹ aimed at transcending an aesthetics of the production of

⁴⁷ *Estetica*, op. cit., p. 7.

⁴⁸ *Estetica*, op. cit., pp. 9, 75-76.

⁴⁹ Vattimo, *Poesia e ontologia*, op. cit., p. 80.

⁵⁰ S.L. Schmidt, *Literaturwissenschaft als argumentierende Wissenschaft, Grundlagen einer rationalen Literaturwissenschaft*, Munich, Fink 1975.

⁵¹ In addition to the works cited in 27 and 41, see also by Jauss; *Literaturgeschichte als Provokation der Literaturwissenschaft*, Konstanz, Universitäts Druckerei 1967, *Kleine Apologie der ästhetischen Erfahrung*, Konstanz, Universitätsverlag 1972; "Der literarische Prozess des Modernismus von Rousseau bis Adorno", in *Adorno-Konferenz 1983*, edited by L.V. Friedeburg and J. Habermas, Frankfurt a.M. Suhrkamp 1983; "Da Cambray a Constanza: l'avventura della critica", in *Intersezioni VI* (1986), pp. 413-426. For an informed outline of Jauss's "theory of reception" and an initial assessment of his aesthetic, cf. G. Gentili, "Introduzione" in *Apologia dell'esperienza estetica* op. cit., R. Warming, "Rezeptionsästhetik als literaturwissenschaftliche Pragmatik", in *Rezeptionsästhetik*, edited by R. Warming, Munich, Fink 1975 (1979), pp. 23-25; G. Carchia, "Estetica e negatività. Nota su

works in the name of studying the text's effects on the *reader*, there has in recent years, especially in America, been a large harvest of scholars (as well as Dworkin himself, one might mention at least Munzer, Abraham, Levinson and Posner⁵²) who, taking a hint from Cardozo,⁵³ have devoted themselves to analyzing the procedure of interpreting legal theses on the basis of the analogy with literary criticism. Obviously, all those who have aimed at underlining this analogy between law and literature have got aid and comfort from the overthrow in literary theory of the ancient primacy of the author, in favour of the present primacy of the reader.⁵⁴

But one preliminary observation, which might in some respects be taken for granted, should be made immediately. It does have consequences not without significance for legal systems of the codified type. One may speak

H.R. Jauss", in *Rivista di estetica* 1979, no. 2, pp. 107-110; Of W. Iser cf *Der implizite Leser*, Munich, Fink 1972, *Der Akt des Lesens. Theorie der ästhetischen Wirkung*, Munich, Fink, 1976; *The Act of Reading. A theory of Aesthetic Response*, Baltimore, The John Hopkins University Press 1978; "Die Appelstruktur der Texte", in *Rezeptionsästhetik, op. cit.*, pp. 228-252.

⁵² S. Munzer, "Right Answers, Preexisting Rights, and Fairness", in *Georgia Law Review*, XI (1977), pp. 1055-1068; S. Levinson, "Law as Literature", *Texas L. Review* 60 (1982), pp. 373-403; K.S. Abraham, "Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair", in *Rutgers Law Review* (1979), pp. 676-694; R.A. Posner, "Law and Literature: a relation reargued", in *Virginia Law Review* 72 (1986), pp. 1351-1392; J.B. White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life", in *U. Chi. Law Review* 52 (1985), pp. 684-702; *idem*, "Law as Language: Reading Law and Reading Literature", *Texas Law Review* 60 (1982), pp. 415-445; for a general discussion of the problem of "narrative coherence" cf. J.D. Culler, *The Pursuit of Signs: Semiotics Literature Deconstruction*, Ithaca, (N.Y.) Cornell University Press 1981; *idem*, *On Deconstruction: Theory and Criticism after Structuralism*, London, Routledge 1982.

⁵³ B. Cardozo, "Law and Literature and other Essays and Addresses" in *Selected Writings of Benjamin Nathan Cardozo, The Choice of Tycho Brahe*, edited by M.E. Hall, New York, Fallon Publications 1947, pp. 339-428.

⁵⁴ Posner, *Law and Literature, op. cit.*, p. 1361. For the debate that ensues between the Konstanz school's aesthetic of reception and the American critique of methodological objectivism in interpretation, cf. S. Fish, "Why No One's Afraid of Wolfgang Iser", in *Diacritics* XI (1981), pp. 2-13; W. Iser, "Talk Like Whales", in *Diacritics* XI (1981), pp. 82-87. For Fish's interesting theory of "interpretive communities", see the fundamental *Is There a Text in This Class? Authority of Interpretive Communities*, Cambridge (Mass.), Harvard College 1980; *idem*, "Anti-professionalism", in *Cardozo Law Review* 1987, to be published shortly; S. Fish, "Working on the Chain Gang: Interpretation in Law and Literary Criticism", in *The Politics of Interpretation*, edited by W.J.T. Mitchell, Chicago, University of Chicago Press 1983, pp. 271-286.

of an analogy between literary interpretation and legal interpretation, with the latter conceived of as *Rechtsfortbildung*,⁵⁵ as an activity of a creative nature, that is, abandoning the traditional legal-positivist theory of interpretation (which still permeates the dominant culture of jurists) whereby jurisdiction consists in a mechanical, purely declarative activity (from this point of view it is undoubtedly symptomatic that the "game" of bringing legal and literary interpretation together has been played more in an English-speaking than a Continental context; there, as with literature, judges are simultaneously authors and interpreters of one and the same process of production of law).

In the refined, graphic image of the chain novel, coined by Dworkin in *Law's Empire*⁵⁶ to compare legal interpretation of hard cases to a novel with each chapter written by a different writer, the judge should in common law regard himself as a writer of this chain novel, as a link in one single complex chain (*Law as integrity*⁵⁷) that links judicial interpretive precedents, previous pronouncements, history and future decisions,⁵⁸ thereby continuing and enriching the tradition.

In the context of such endeavours, alternate to positivist conceptions of law, in working out interpretive models based on comparison with the procedure of literary interpretation, particular importance has attached recently to the notions of normative coherence and narrative coherence as criteria for justification of the major and the minor premise respectively of the judge's decision-making syllogism or the concluding syllogism of the proposition of doctrine. But even here one introductory warning cannot be omitted. Despite

⁵⁵ K. Larenz, "Richterliche Rechtsfortbildung als methodisches Problem", *Neue Juristische Wochenschrift*, 1965, pp. 1 ff; J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgrundlagen richterlicher Entscheidungspraxis*, Frankfurt a.M., Athenäum Fischer 1972, pp. 177 ff; R. Wank, *Grenzen richterlicher Rechtsfortbildung*, Berlin, Duncker and Humblot 1978; L. Larenz, *Methodenlehre der Rechtswissenschaft*, Berlin, Heidelberg, New York, Tokyo, Springer 1983, pp. 351 ff.; F. Müller, *Strukturierende Rechtslehre*, Berlin, Duncker and Humblot 1984, pp. 154 ff.; G. Zaccaria, *Ermeneutica e giurisprudenza. Saggio sulla metodologia di Josef Esser*, Milan, Giuffrè 1984, pp. 113 ff., 126 ff.

⁵⁶ R. Dworkin, *Law's Empire*, Cambridge Mass., London, England, The Belknap Press of Harvard University Press 1986, pp. 228 ff.

⁵⁷ *Law's Empire*, pp. 225 ff.

⁵⁸ *Law's Empire*, pp. 238 ff.; *A Matter of Principle*, Oxford, Clarendon Press 1986, pp. 158 ff.

the several, differentiated formulations given to it in contemporary legal theory (for instance, Dworkin's theory of adjudication uses the idea of coherence to support one type of description of the legal system⁵⁹), the concept of coherence⁶⁰ and its practical utility in reference to the legal system and legal argument are still very far from showing unanimity and precision of content and definition (while Dworkin, to give only one example, speaks of *normative consistency* and *narrative consistency*,⁶¹ MacCormick instead uses the terms *normative coherence* and *narrative coherence*⁶²). Moreover, limits of

⁵⁹ "Hard Cases", in *Harvard Law Review* 88 (1975), then in *Taking Things Seriously*, London, Duckworth 1981, pp. 81-130; "No Right Answer?", in *Law, Morality and Society. Essays in Honour of H.L. Hart*, edited by P.M.S. Hacker and J. Raz, Oxford, Clarendon Press 1977, pp. 57-84. On Dworkin's theory of jurisdictional judgement, see the precise paper by R. Guastini, "Soluzioni dubbie. Lacune e Interpretazione secondo Dworkin. Con un'Appendice bibliografica", in *Materiali per una storia della cultura giuridica* XIII (1983), pp. 449-467, with a rich bibliography.

⁶⁰ Apart from Dworkin's and MacCormick's contributions cited in the following works, see also, for coherence in a legal context, at least A. Aamio, "On Truth and the Acceptability of Interpretive Propositions in Legal Dogmatics", in *Rechtstheorie, Beiheft 2, Methodologie und Erkenntnistheorie der juristischen Argumentation*, edited by A. Aamio, I. Niiniluoto, J. Uusitalo, Berlin, Duncker and Humblot, pp. 33-49; "On the Legal Truth and Validity of Interpretive Statements in Legal Dogmatics", in *Philosophical Perspectives in Jurisprudence*, "Acta Philosophica Fennica" 36 (1983), pp. 173 ff.; A. Aamio, R. Alexy, A. Peczenik "The Foundation of Legal Reasoning", in *Rechtstheorie* 12 (1981), pp. 268 ff.; M. Hanen, "Justification as Coherence", in *Law, Morality and Rights*, edited by M.A. Stewart, Dordrecht, Boston, Lancaster, Reidel 1983, pp. 67-92; A. Peczenik, *The Basis of Legal Justification*, Lund, Infotryck AB 1983, pp. 88 ff.; Bert C. van Roermund, "On 'narrative coherence' in legal contexts", in *Reason in Law. Proceedings of the Conference held in Bologna, 12-15 December 1984*, edited by C. Faralli and E. Pattaro, Milan, Giuffrè 1988, to be published shortly.

⁶¹ *No Right Answer?* p. 78, Italian trans. *op. cit.*, p. 494; *Law's Empire*, *op. cit.*, pp. 219 ff. On legal coherence in Dworkin, in the broader context of his conception of the legal order, see F. Viola, *Autorità e ordine del diritto*, Torino, Giappichelli 1987, pp. 184 ff., 189 ff.

⁶² N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press 1978, pp. 86-93, 152 ff., 195 ff.; "The Coherence of the Case and the Reasonableness of Doubt", in *Liverpool Law Review*, 2 (1980), pp. 45 ff.; "Coherence in Legal Justification", in *Theory of Legal Science. Proceedings of the Conference of Lund 11-14 December 1983*, edited by A. Peczenik, L. Lindahl, B. van Roermund, Dordrecht, Boston, Lancaster, Reidel 1984, pp. 235-251. On the notion of *coherence* in MacCormick see also the critical annotations by O. Weinberger, "Objectivity and Rationality in Lawyers' Reasoning", in *Theory of Legal Science*, *op. cit.*, pp. 229 ff., Italian trans. in *L'analisi del ragionamento giuridico*, *op. cit.*, pp. 103 ff.

space allow here only an indirect and oblique sketch of an autonomous analysis of the general concept of *coherence*. Though moving within the broad framework constituted by the "extended" consideration of coherence which, especially as put forward by Aarnio, Alexy and Peczenik,⁶³ covers the range of hypotheses going from formal logical derivation to *consistency*, we shall here refer particularly to the theses of the author who, in the contemporary debate so far, has perhaps given the clearest, most circumstantial presentation, namely Neil MacCormick.⁶⁴

By his own admission, the concept of *coherence*, applied to the specific context of legal justification, is in many respects elusive⁶⁵ and "slippery".⁶⁶ Schematizing and summarizing to the utmost his ability constructed thought, we may pick out the following as the essential, constitutive elements of the concept of coherence in MacCormick:

a. Coherence acts as a special aspect of the external justification of judicial or jurisprudential argumentation, more exactly as a *test* aimed at ascertaining its well-foundedness.⁶⁷

b. It is something different from and more than mere *consistency* in the sense of absence of logical self-contradiction.⁶⁸ With Aarnio, Peczenik and Alexy, one might say that the principle of *coherence* may be regarded as including the principle of *consistency* as a negative aspect,⁶⁹ in the sense that the absence of logical self-contradictoriness (which can of course be spoken of only within a system of previously constructed or empirically ascertained

⁶³ Aarnio, Alexy, Peczenik, *The Foundation of Legal Reasoning*, *op. cit.*, pp. 268-269. For a broader perspective on the importance of forms of legal rationality not only as formal logical coherence but also as *consonantia juris*, cf. F. Viola, *Autorità e ordine del diritto*, *op. cit.*, p. 76 ff.

⁶⁴ Cf. the contributions cited in Note 62.

⁶⁵ *Coherence in Legal Justification*, *op. cit.*, p. 235.

⁶⁶ The "slipperiness" of the concept of *coherence* by comparison with the greater clarity of that of *consistency* is stressed by P. Comanducci, "Osservazioni in margine", *L'analisi del ragionamento giuridico*, *op. cit.*, p. 275.

⁶⁷ *Coherence in Legal Justification*, *op. cit.*, p. 235.

⁶⁸ *Ibid.*

⁶⁹ Aarnio, Peczenik, Alexy, *The Foundation of Legal Reasoning*, *op. cit.*, p. 260.

meanings) is a necessary, but not sufficient, condition for there to be *coherence*. Thus, a set of norms may appear as being without internal coherence, i.e. prove incapable of "hanging together" as a rationally correlated whole in order to realize one or more common values or principles,⁷⁰ even supposing it is without internal contradictions. Similarly, it may be said that a discourse, a story, likewise without self-contradictoriness, may appear "non-sensical", as an assemblage that is not altogether coherent.

Even as regards the objects of which they may be predicated, there is still a difference between coherence and consistency, since the first, apart from being predicated as the coherence of statements (linguistic entities) may be predicated also of conduct.⁷¹

c. Treating coherence as a specific quality whose presence is to be traced in the intention of the normative corpus or in the interpretive discourse of those applying it, as consisting in a rational reconstruction of either questions of law (normative coherence) or evidential facts from which to derive empirical inferences (narrative coherence), constitutes merely a fiction, a logical expedient useful for justifying the congruency of the legal argument.⁷²

d. In more specific connection with narrative coherence, it may be defined as a form of empirical justification, since the reasons adduced in favour of the conclusion, and the conclusion itself, consist of factual assertions or predictions the truth or likelihood of which is being established.⁷³ Narrative coherence has a logico-hermeneutic - though the term is not MacCormick's - nature, if it is true that it concerns facts and events of the past not capable of "immediate proof through direct observation"⁷⁴ and brought into rational relationship with true propositions relating to observed events.⁷⁵ Ultimately, it consists in justifying certain factual conclusions on the basis of a test of explicability of the proposition, to be verified within the explanatory scheme

⁷⁰ *Coherence in Legal Justification*, op. cit., p. 238.

⁷¹ Comanducci, *Osservazioni in margine*, op. cit., p. 272.

⁷² *Coherence in Legal Justification*, op. cit., p. 243.

⁷³ Comanducci, *Osservazioni in margine*, op. cit., p. 274.

⁷⁴ *Coherence in Legal Justification*, op. cit., p. 245; *Legal Reasoning and Legal Theory*, op. cit., pp. 86 ff.

⁷⁵ *Coherence in Legal Justification*, op. cit., p. 248.

itself, which explains propositions regarded as true on the basis of direct perception. The hermeneutic transcendental presupposition of the test of narrative coherence, which from true propositions relating to the present infers likely propositions relating to the past, involves the possibility and capability of establishing the present truth about past events,⁷⁶ i. e. the general idea of present *application*, in judgement, of legal norms to facts that happened in the past, for proving of which the direct path of immediate observation is not possible.

The theory of coherence maintained and argued by MacCormick undoubtedly has many original aspects and some passages that are hard to dispute. However, we would here like to list a few of the problems left open and raise a few queries around the theoretical proposal.

One general limit to the concept of coherence worked out by MacCormick comes above all from the fact that it has clearly been developed bearing in mind the procedure of legal proof characteristic of English law of evidence;⁷⁷ accordingly, it is much more applicable to a legal system like the English one, based on the concept of proof as *argumentum* and on the primacy of testimony (the memories and perceptions even of honest witnesses may very well be erroneous or untrustworthy), than to legal systems like the Continental ones based on the primacy of the written document and on subordination of the interpreter to the text.⁷⁸

⁷⁶ *Legal Reasoning and Legal Theory*, op. cit., p. 87.

⁷⁷ For a first, comprehensive overview of the theme of law of evidence see, among the most recent contributions: Phibson, *On Evidence*, London, Sweet and Maxwell 1970; L. Cohen, *The Probable and the Provable*, Oxford, Clarendon 1977; G.C. Lilly, *Introduction to the Law of Evidence*, St. Paul Minnesota, West Publishing 1978; R. Cross, *Evidence*, London, Butterworths 1979; R. Cross, N. Wilkins, *An Outline of the Law of Evidence*, London, Sweet and Maxwell 1981; P. Carter, *Cases and Statutes on Evidence*, London, Butterworth 1980. C. MacCormick, *Handbook of Evidence*, St. Paul, Minnesota, West Publishing 1984; A. Kean, *The Modern Law of Evidence*, London, Professional Book Limited 1985.

⁷⁸ On the legal conception of proof as *argumentum* see A. Giuliani, "Il concetto classico di prova: la prova come 'argumentum'", in *Jus XI* (1960), pp. 425-444; *Il concetto di prova. Contributo alla logica giuridica*, Milan, Giuffrè 1961, pp. 62 ff. On the characteristics of proof in Continental systems see M. Cappelletti, "La natura delle norme sulle prove", in *Scritti dedicati ad Alessandro Raselli*, I, Milan, Giuffrè 1971, pp. 431-442; *Le prove nel diritto civile amministrativo e tributario: Atti del Convegno organizzato dalla Facoltà di Giurisprudenza dell'Università di Sassari 20-22 settembre 1984*, edited by C. Glendi, S. Patti, E. Picozza, Turin, Giappichelli 1986; S. Patti, *Prove. Disposizioni generali Art. 2697-2698. Commentario del Codice Civile*, edited by A. Scialoja and G. Branca, Bologna-Roma, Zanichelli-Foro italiano 1987.

In a common-law system, the law of evidence appears essentially as a system of rules of exclusion, i.e. logical bans on admitting the proof, the relevance of which is understood in negative terms, as forbidding courses of enquiry that might lead to error or to confusing the problems.⁷⁹ From this viewpoint the theory of narrative coherence, as a technique of "logic of testimony" connected with a more general theory of argumentation in ethico-normative systems⁸⁰ would appear to be a stimulating model for Continental law of evidence. However, it is too bound up with the techniques of trial in English-speaking countries and the principles, characteristic of common law, of restricting testimony solely to the perceptions of the witness (opinion rule) and of subjecting it, as a check on veracity, to cross-examination.⁸¹

A further limit to the notion of narrative coherence lies in its being better and more specifically applicable to one field of law only, namely criminal law. There, the problem of deriving empirical inferences from evidential facts is undoubtedly more acute. But a view that treats the law as a whole on the model of criminal law alone (or even on one particular interpretation of it suggested by detective literature à la Sherlock Holmes) cannot, precisely because it is so specific, fully convince us.

A further limit of a general nature lies in the fact that coherence, in the sense of rationality and cohesion, is an ideal characteristic of a legal system that no longer corresponds to the characteristics of present-day legislation nor the present situation of legal systems.⁸² The characteristic may be desirable and advisable, but it is scarcely realistic, if it is true that all contemporary legal systems, being the result of stratified, temporally superposed normative material, include a number of principles and rules that conflict with each other and are sometimes incompatible in respect of values that inspire them. Even one specific sector of a system (criminal, civil, administrative) and sometimes even a single institution within that (property regulations or slander and libel law) are most often very far from constituting a single,

⁷⁹ On this conception of law of evidence cf. A. Giuliani, *Il concetto della prova*, op. cit., pp. 189 ff; "Dialogo e interpretazione nell'esperienza giuridica", in *Interpretazione e dialogo. Atti del IV Colloquio sulla interpretazione*, edited by G. Galli, Turin, Marietti 1983, pp. 25 ff.

⁸⁰ Comanducci, *Osservazioni in margine*, op. cit., p. 272.

⁸¹ N. MacCormick, *Coherence in Legal Justification*, pp. 243, 247.

⁸² Zaccaria, "L'obiettività del giudice tra esegesi normativa e politica del diritto", *Rivista di diritto civile*, XXV (1979), pp. 610 ff.; R. Guastini, *Soluzioni dubbie*, op. cit., p. 455.

coherent design. (The first problem with which legal argument on coherence, particularly normative coherence, has to cope lies, then, in identifying premises on the basis of which one may speak of a coherent legal totality.) Certainly, it may be in principle preferable - as the now entirely abandoned legal positive dogmas of the unity and coherence of the system asserted - to assume that the individual normative prescriptions were conceived as individual articulations of a coherent, organic legal system. It may certainly be desirable to presuppose a world of perfectly rational human events located within a rational, coherent vision of the world.⁸³ But in each case we are rather far from actual reality. Treating the legal system or the conduct of individuals as a jigsaw puzzle with every piece fitting in perfectly⁸⁴ tends at this point to look like a *petitio principii*, practically useless however laudable, which for (a certain number of) relations from which coherence is woven together is in the last analysis based on normative convictions and on beliefs as to the cause-effect relationships held by the constructor of the explanatory scheme⁸⁵ (With reference to facts, coherence arises not only from the extent to which the legal observer, undoubtedly not in "value-free" fashion, perceives its existence, but also because there exists a universe lying behind the facts that makes it possible to perceive them as coherent. In other words, coherence must necessarily refer to a pre-given scientific universe that is not fully available).

But the principal point among the issues raised by the notion of narrative coherence is perhaps a different one. The model put forward by MacCormick and other contemporary theorists of law is essentially one of judicial argumentation and justification, and it is as such that it should primarily be analyzed.⁸⁶

⁸³ On these process methodologies in the systems of common law, see the classic Heidelberg-Wigmore, a treatise "on the Anglo-American system of evidence in trials at common law", Boston, Brown & Co., 1940, 3rd edition, vol. V, pp. 29 ff.; Y.M. Maguire, Weinstein, Jadbourn, Mensfield: *Evidence, Cases and Materials*, Brooklyn, Foundation Press, 1965, 5th edition, pp. 283 ff.; U. Ehrlich, New York, Putman, 1970.

⁸⁴ MacCormick, *Legal Reasoning and Legal Theory*, p. 90. The comparison between justifying an interpretation and solving a jigsaw puzzle is also in Aarnio, *Philosophical Perspectives*, *op. cit.*, p. 204.

⁸⁵ A. Aarnio, R. Alexy, A. Peczenik, *The Foundation of Legal Reasoning*, *op. cit.*, p. 204.

⁸⁶ *Le fait et le droit. Etudes de Logique juridique*. Travaux du Centre National de Recherches de Logique, Brussels, Bruylant 1961; H.E. Henke, *Die Tatfrage. Der unbestimmte Begriff und seine Revisibilität*, Berlin, Duncker and Humblot 1966; J. Wróblewski, *Facts in Law*, ARSP 59 (1973), pp. 161-178; Aarnio, "Gaps and Interpretation of Facts in Legal Justification",

MacCormick's thesis is that dispute as to past facts can be confined to controversy relating to whether they occurred or not, independently of the legal norms the facts themselves refer to.

In maintaining that in a legal controversy the dispute as to facts does not in most cases involve a conflict of legal interpretation over the norms to apply to them, the narrative coherence approach tends to separate problems of fact and law too much. For in the complex procedure of legal interpretation, they are profoundly linked with each other. The methodological thinking of contemporary German legal hermeneutics (J. Esser, M. Kriele, F. Müller, A. Kaufmann, W. Hassemer⁸⁷) has on the contrary shown that, considered separately, the facts in a legal case and occurrences in life do not have any complete meaning for the purposes of law: their meaning is the result of their entering into a relationship of reciprocal correspondence.⁸⁸ Until the moment they are brought into combination with the vital fact of judging, the components of the legal facts are always constitutively incomplete.

Until brought into connection with specific legal facts of a case, the actual situations presented by experience remain in a state of absolute legal irrelevance.⁸⁹ In order for a piece of human conduct to be brought into relationship with a legal fact, it is not enough that it be brought into relationship with the abstract normative model laid down by the norm. Primarily, the crude factual circumstance, legally irrelevant as such, must be transformed by the interpreter into a circumstance of relevance for law. This con-

in *Philosophical Perspectives*, *op. cit.*, pp. 141-151; *Facts in Law*, edited by W. Twining, ARSP Beiheft no. 16, Wiesbaden, Franz Steiner Verlag 1983.

⁸⁷ Esser, "Möglichkeit und Grenzen des dogmatischen Denkens im modernen Zivilrecht", in *Archiv für die civilistische Praxis*, 1972, vol. 172, pp. 110 ff.; *Vorverständnis und Methodenwahl*, pp. 78, 134; A. Kaufmann, *Analogie und "Natur der Sache"*. *Zugleich ein Beitrag zur Lehre vom Typus*, Heidelberg, Decker & Müller 1982, pp. 37 ff.; M. Kriele, *Theorie der Rechtsgewinnung entwickelt am Problem der Verfassungsinterpretation*, Berlin, Duncker and Humblot 1976, pp. 197 ff.; W. Hassemer, *Tatbestand und Typus. Untersuchungen zur strafrechtlichen Hermeneutik*, Cologne, Berlin, Bonn, München, Heymanns 1968, pp. 56 ff., 103 ff.; F. Müller, *Strukturierende Rechtslehre*, pp. 254 ff.

⁸⁸ Kaufmann, *Analogie und Natur der Sache*, *op. cit.*, pp. 18 ff., 38; Hassemer, "Hermeneutica y derecho", *Anales de la Cátedra F. Suárez* (25) 1985, p. 71.

⁸⁹ J. Hruschka, *Die Konstitution des Rechtsfalles*, Berlin, Duncker and Humblot 1965, p. 9; Hassemer, "Hermeneutica y derecho", pp. 80 ff.

struction of the *Sachverhalt*,⁹⁰ to use the German term, implying a selection among the facts of the legally relevant elements, involves a hermeneutic performance *par excellence*, which becomes lost from the notion of narrative coherence. The latter represents only one partial aspect of the external justification of the legal syllogism, because the facts that happened in the past must then be normatively qualified, i.e. subsumed under the abstract fact of the case (and this normative qualification of factual statements constitutes *also* the minor premise of the syllogism).⁹¹

In other words, MacCormick's approach risks concealing the decisive fact that, just as in the case of normative coherence, it is the judge that first decides whether the norm he takes for applying to a specific fact is to be considered relevant to the case in point, so in the case of narrative coherence it is the judge himself who decides if the fact that the events occurred or not is of relevance for the purposes of the trial, and therefore decisive for resolving the dispute. The ascertainment and reconstruction of the facts are inseparable from procedures of selective and evaluative type, and represent constitutive, essential elements for recognizing the rule: a consideration that renders relative any rigid distinction between "quaestio iuris" and "quaestio facti".⁹²

The role played by legal reasoning, which it should be recalled does not *a priori* dispose of a criterion and a procedure such as to permit absolutely cogent justification of the legal solution to the individual case,⁹³ becomes decisive. But this is true not so much in the sense of the cogency of a more or less rigid logical rigor, as apparently at least implicitly held by MacCormick, as in an eminently and fundamentally hermeneutic sense, whereby the judge takes his attitude towards the credibility of the testimonial evidence or of an interpretive hypothesis because he preconsiders them as incorporable into a whole with coherent meaning. An understanding reached indirectly, through human testimony, gives rise to a field of knowledge where,

⁹⁰ This construction is set out in particularly a clear and effective form by Hassemer, *Tatbestand und Typus*, *op. cit.*, pp. 118 ff.; Larenz, *Methodenlehre der Rechtswissenschaft*, *op. cit.*, pp. 262 ff., 266 ff.

⁹¹ Comanducci, *Osservazioni in margine*, *op. cit.*, p. 274.

⁹² Esser, *Vorverständnis und Methodenwahl*, *op. cit.*, pp. 30 ff., Italian trans. *op. cit.*, pp. 24 ff.; Zaccaria, *Ermeneutica e giurisprudenza. Saggio sulla metodologia di Josef Esser*, p. 58; Giuliani, *Dialogo e interpretazione nell'esperienza giuridica*, *op. cit.*, p. 37.

⁹³ Esser, *Vorverständnis und Methodenwahl*, *op. cit.*, pp. 124 ff.

formalization being impossible, truth as enquired into in the situation of dispute and contradictoriness proper to the trial has to be content with the status of probable truth and not of necessary truth.⁹⁴

The indisputable evidence that "in the end" seems forcefully to impose itself depends on a series of foregoing transitions, on a complex plurality of cognitive and evaluative operations in turn dependent on the "preparation of the premises" of the syllogism,⁹⁵ i.e. on the formulations and judicial choices whereby the normative and factual material is elaborated.

Does all this mean that the concept of narrative coherence is quite useless, and cannot be turned to any advantage? We think not. Firstly, because the implicit objective of the interpretive model sketched out by MacCormick, if not the explicit substance of his theses, seems broadly acceptable. It aims at finding and suggesting forms of rationality and interpretive objectivity that are different and distinct from those founded on the epistemological model of the natural sciences and therefore, as more respectful of the specific nature of legal argumentation, able to free the judge's argumentation from the exercise of excessive discretion (from an excessive subjection to the models of science⁹⁶). This objective is, true, partly missed, since it still remains fundamentally uncertain whether it is possible to construct a system of criteria relative to coherence sufficiently beyond all doubt to provide us with the maximum coherence in justifying a legal argument.⁹⁷

But here, it should be stressed, the limits derive not so much from what MacCormick says as from the literary genre his endeavour seems to fall into, that of the analogy, however suggestive as a "game", between literary interpretation and legal interpretation. There are too many differences between literary works and laws or constitutions to be interpreted for a fecund analogy to be possible in the two different types of interpretation, or to legitimize excessive insistence on the parallel. Of all these differences, there is only one we would wish to point to here: while the literary critic, however influential, always remains a private individual operating in the competitive "market" of

⁹⁴ Giuliani, *Dialogo e interpretazione nell'esperienza giuridica*, *op. cit.*, p. 26.

⁹⁵ Esser, *Vorverständnis und Methodenwahl*, *op. cit.*, pp. 53 ff.

⁹⁶ For this requirement, the freeing of jurisprudence from an epistemological model developed elsewhere, cf. my *Positivismo ed ermeneutica nell'epistemologia giuridica contemporanea*, *op. cit.*, pp. 935-949.

⁹⁷ Aarnio, Alexy, Peczenik, *The Foundation of Legal Reasoning*, *op. cit.*, p. 269.

the competent public, the judge is an official explicitly deputed to exercise public power. That is why his undeniable creativity is tolerated only on condition that his interpretive power is limited: and the chief limit is constituted precisely by the authority of legal texts. Accordingly, legal interpretation must have narrower boundaries than literary interpretation.⁹⁸

All this is not intended to sound like a conclusive objection of a general nature to the idea of coherence,⁹⁹ nor to deny that the coherence of a legal argument may constitute *an* interesting test of its well-foundedness as reasoning.¹⁰⁰ On this level, the basic advantage of the theses of narrative coherence lies, in our opinion, in showing how complex is the interplay between logical fit and justification in judicial reasoning and argumentation.

Nevertheless, precisely because it is only *one* of the possible forms of check on the rationality of legal proceedings (in much more complex fashion, Joseph Esser has talked of a necessary convergence between *Richtigkeitskontrolle*, *Stimmigkeitskontrolle* and obviousness of the solution¹⁰¹), care should be taken not to regard its importance as absolute or attribute to it, as MacCormick seems to,¹⁰² downright central importance in the justification of legal decisions by erecting it into the basic criterion of a theory of argumentation. Between asserting that our intellectual world ought to be rationally intelligible and not a chaos of impressions and ideas, which is quite acceptable,¹⁰³ and erecting the presupposition of the non-contradictoriness and coherence of the interpreter's narrative plot into a central justificatory element of legal decision there is quite a gap.

⁹⁸ Posner, *Law and Literature: A Relation Reargued*, *op. cit.*, p. 1370.

⁹⁹ Aamio, Alexy, Peczenik, *The Foundation of Legal Reasoning*, *op. cit.*, pp. 269-270.

¹⁰⁰ MacCormick, *Coherence in Legal Justification*, *op. cit.*, p. 235.

¹⁰¹ Esser, *Vorverständnis und Methodenwahl*, *op. cit.*, pp. 19 ff, 26 ff., 151, 173.

¹⁰² MacCormick, *Coherence in Legal Justification*, *op. cit.*, p. 245.

¹⁰³ MacCormick, *Coherence in Legal Justification*, *op. cit.*, pp. 247-248, *Legal Reasoning*, *op. cit.*, p. 90.

COHERENCE, TRUTH AND RIGHTNESS IN THE LAW

ALEKSANDER PECZENIK

1. THE PROBLEM OF LEGAL COGNITIVISM¹

Any discussion of the role of coherence in the law must pay attention to the problem of moral cognitivism. Can one assume that norms or value judgements themselves possess truth values? This is, of course, the central problem of value theory. Let me thus make some observations, with regard to this area.

Different (meta-) theories of value statements compete with each other. One may classify them, as follows:²

theories of value statements		
cognitivist		non-cognitivist
naturalist	non-naturalist	

Cognitivist theories identify value statements with some theoretical propositions, true or false. Naturalist theories regard value statements as theoretical propositions about "natural" properties of persons, states of affairs, objects, actions, etc.

One can, for example, define a morally good action, as follows:

1) If and only if an action, H, increases happiness of other people, then H is morally good.

¹ Cf. Peczenik, *Rätten och förnuftet*, 2nd ed. Lund 1988, pp. 88 ff. (and an English version, *On Law and Reason*, *supra* section 2.5.2 also 2.5.3.).

² Cf., e.g., M. Moritz, *Inledning i värdeteori*, Lund 1976 (1970), para. 10 ff.

2) If and only if an action, H, fits a certain calculus of human preferences, then H is morally good.

3) If and only if an action, H, promotes fulfilment of human talents, then H is morally good.

However, all naturalist theories face Moore's famous "open question argument". One can thus meaningfully ask such questions as "To be sure, H increases happiness, but is H good?", "To be sure, H fits the preferences, but is H good?" etc. The fact that such questions are meaningful shows that goodness is not identical with any naturalist property. If it were, such questions would be as meaningless as the question "To be sure, John is a bachelor but is he married?". The latter is meaningless precisely because a bachelor is identical with a man who has never married. The former are meaningful, since to be good is not the same as to increase happiness, etc.

The failure of the naturalist theories makes it understandable why the non-naturalist ones were created. Non-naturalist (yet cognitivist) theories thus regard value statements as theoretical propositions about "non-natural" properties of persons, states of affairs, objects, actions, etc. One can, e.g., say that the statement "an action, H, is morally good" means "H has the property of goodness", not identical with any "natural" property or a combination thereof. However, it is difficult to state anything precise about this property.

Certain philosophers have also assumed that people possess a "sense of value" (analogous to sight, sense of hearing, etc.). One uses one's eyes to see that something is red, etc. Analogously, one uses the sense of value to "see" that an action, etc. possesses such a non-natural value-property as goodness.

Theories of "the sense of values" are, however, controversial. Value-properties are unique in the sense that they only cause one single result, that is, they affect the sense of value, and thus cannot be confirmed in any other way. If a person is "value-blind", that is, lacking the sense of value, he cannot learn at all that an action, etc. is good. The situation is worse than in the case of ordinary blindness. A blind person can use physical instruments to learn what colours things are but a value-blind one has no access to any value-indicators. Any discussion between a value-blind and a value-seeing person is thus impossible.

All cognitivist theories face the following difficulty too. Value statements are reasons for action. Suppose that Peter seriously claims that H is a morally good action and that nothing incompatible with H is better. It is then natural for Peter to have a disposition both to approve of h and to perform H, if he has an opportunity to do so. On the other hand, a pure description of properties, either natural or otherwise, does not seem to be so intimately connected with action.

One may regard the *non-cognitivist* theories as a reaction against the difficulties unsolved by the cognitivist ones. The non-cognitivist theories regard value statements as practical statements, expressing (not describing!) attitudes, feelings, etc. One can, for example, say that the statement "H is a good action" means "I am hereby expressing my attitude: I like H". Value statements are emotional projections, conveying the speaker's feelings to the object causing them. Consequently, value statements have no truth value. They can no more be true than numbers healthy.

Among non-cognitivists, one must mention Axel Hägerström. His views were built up around the following theses. All knowledge concerns things which exist in time and space. Value statements lack truth values, since they "describe" something outside of time and space. The value "existing" in an object, for example, goodness "existing" in it, does not exist in any definite sense at all. Suppose that a person A, gave bread to a poor man, B, and this was a good action. It is meaningless to attempt to state precisely where the goodness does exist, in A's hand, in the bread, in B's mouth, etc. Neither can values exist in a particular world, outside time and space, since no such world can exist. The expression "the world outside time and space" is self-contradictory. Value statements are self-contradictory too, apparently saying something about the objects but in fact only expressing feelings. However, one can also criticize non-cognitivism.

1. Value statements, such as "H is good", are object-oriented. The statement "H is good" is thus a statement about H. But a non-cognitivist claims that this statement only *apparently* says something about the action H, but *in fact* only expresses feelings. The non-cognitivist thus assumes a corrective attitude towards ordinary language. It is not easy to tell what gives him sufficient reason to do so.

2. Value statements can meaningfully be, and often actually are, supported by reasons. When Peter says that John is a good person, he may add, for example, "...because John has a disposition to help people". Feelings, on the other hand, need no such support.

3. Non-cognitivists must deny that value statements uttered by different persons can be logically incompatible. When Peter says "H is good" and Paul says "H is not good", these value statements seem to be incompatible, although no logical incompatibility exists between a description of the fact that Peter approves of H and a description of the fact that Paul disapproves of H.

4. Suppose that Peter approves of telling the truth and disapproves of causing unhappiness. If John tells Paul the truth and thus makes him unhappy, Peter experiences two different feelings: approval of the action of telling the truth and disapproval of causing unhappiness. In other words, he experiences "mixed feelings". It is perfectly possible to feel this way. Moral statements corresponding to such feelings often have a provisional, *prima facie* character.³ "*Prima-facie*" means that other, overriding reasons may justify the contrary conclusion. To tell the truth is thus a good action, unless it causes too much unhappiness, suppresses human talents too much, etc. On the other hand, when morally evaluating John's action, Peter cannot satisfy himself with a "mixed" judgement. He must make up his mind, that is, he must weigh and balance the reasons for and against the conclusion that the action is good. Peter must thus say in the concrete case whether the goodness of telling the truth outweighs the badness of causing unhappiness.

5. Whoever utters a value statement assumes that it is right. Feelings, on the other hand, are neither right nor wrong, they are simply there.

The following story elucidates some of these difficulties. In many countries, pollution causes serious damage to forests. Suppose that pollution is an inevitable result of industrial development, and the latter a necessary condition of a high material standard of living. Suppose furthermore that a supporter of a high standard of living, A, discusses this with an environmentalist, B. To be sure, they can have different beliefs concerning facts. A can, for example, say that one can increase industrial output without increasing pollution. B can claim that a high standard of living is possible without growth of industry. But even if they manage to agree about the facts, the discussion can continue. In many cases, one must *decide* what is better: development of the material standard of living or protection of clean air. The question does not concern either A's or B's feelings. These are clear. A likes the increased standard of living more than protection of the environment; B likes the latter more than the former. The discussion instead concerns the question of who is right. Is protection of the environment in this case more important than an improved living standard or is it not? The question is practically important and both participants in the discussion claim that it is soluble.

To be sure, a moderate non-cognitivist can regard the discussion between A and B as mutual attempts to show the opponent that he endorses incompatible value statements. But so what? If one is a non-cognitivist, one must

³ Re the concept of "*prima facie*", cf. W.D. Ross, *The Right and the Good*, Oxford 1930, pp. 27-28.

say that value statements merely express feelings and these can be "mixed", (see above). Moreover, if both A's and B's different value systems are logically consistent, the discussion must stop. If the non-cognitivists are right, one cannot attempt to show which system is *better*.

There exists an interesting analogy between non-cognitivism in moral theory and scepticism in epistemology. A non-cognitivist argues that no knowledge of values can exist. A scepticist gives philosophical reasons for the conclusion that no knowledge at all is possible. The objective reality is not accessible for human beings. Our knowledge is based on observations but these are fallible, for example, as a result of optical illusions. If an evil demon deceived all of us all the time, we could not know it. One cannot falsify scepticism, but in order to live a normal life one must ignore it.

2. RATIONALITY

Although it is thus uncertain whether moral value statements and moral norm-expressive statements have truth values, one can justify them rationally.

To begin with, one can formulate various circumstances *restricting arbitrariness* of moral reasoning.

1. A moral statement can often be presented as a *logically correct conclusion* from a certain set of premises.
2. One can ask, and often also answer, the question of whether these premises are (a) logically *consistent* and (b) *linguistically correct*.
3. One can also pose the question of whether the premises are *reasonable*.
4. Furthermore, one can give additional reasons, deciding whether these premises *weigh more* than those reasons telling against the conclusion.
5. One can also *discuss* moral questions in an impartial and otherwise objective way.

Consequently, one can distinguish between three different demands of rationality: *logical* rationality (in brief, L-rationality), *supportive* rationality (in brief, S-rationality) and *discursive* rationality (in brief, D-rationality).⁴

L-rationality of a conclusion means that it:

- 1) *follows logically* from a set of premises that are
- 2) both logically *consistent* and *linguistically correct*.

⁴ *Ibid.*, pp. 86 ff. (and the English version, *On Law and Reason*, *supra* section 2.4.).

L-rationality is a minimum demand. A "justification" based on either inconsistent or linguistically incorrect premises is obviously worthless.

S-rationality of a conclusion means that it follows from a set of premises that:

3) are *reasonable* and

4) *weigh more* than reasons against the conclusion.

In brief, an S-rational conclusion *has reasonable support*.

S-rationality constitutes the basic idea of rationality, its point. It includes both L-rationality and the above-mentioned demand for reasonable support. Neither inconsistent nor linguistically incorrect premises are reasonable but the demand of reasonableness is stronger than that of logical consistency and linguistic correctness. Some logically and linguistically correct statements may be unreasonable, for example, evidently false.

D-rationality of a conclusion means that it would not be refuted in a *perfect discourse*.

D-rationality includes both S-rationality and some additional demands. In some cases, both the conclusion and its negation follow from (different but) reasonable sets of premises. One can then hope that a discourse would determine which of these weighs more.

3. MORAL THEORIES AND CRITERIA⁵

Further discussion of moral reasoning requires more information about the manner of justifying moral value- and norm-statements.

Several competing moral theories are admissible in the language of morals. Some of these formulate or imply *definitions* of a good action. *Inter alia*, the following definitions are possible:

1) If and only if an action, H, increases happiness of other people, then H is morally good.

2) If and only if an action, H, fits a certain calculus of human preferences, then H is morally good.

3) If and only if an action, H, promotes fulfilment of human talents, then H is morally good.

4) If and only if an action, H, fits some goals and standards of perfection inherent in established social practices, then H is morally good.

⁵ *Ibid.*, pp. 88 ff. (and the English version, On Law and Reason, *supra* section 2.5.2. also 2.5.3.).

5) If and only if an action, H, increases social welfare, then H is morally good.

6) If and only if an action, H, increases social progress, then H is morally good.

7) If and only if an action, H, increases justice, then H is morally good.

Each general theory of this kind defines moral goodness and, at the same time, stipulates a general norm for a moral action. The theories express, in other words, various *meaningful* (L-rational) and *reasonable* (S-rational) premises, supporting the conclusion that one ought to perform a certain action.

However, one can give reasons not only in favour of each theory but also against it. One can also imagine a greater number of general moral theories and combinations of them. Furthermore, such expressions as "increases social welfare", "increases social progress", "increases justice", etc. are vague. For this reason, one needs some more concrete *criteria* of moral goodness to be used together with, or perhaps instead of, the general theories. Some of the criteria correspond to certain established moral principles. There exists a considerable consensus by people, at least within the Western culture, that some principles are moral and that it is a morally good thing to pay attention to them. One can, for example, mention the following principles:

1) One ought not to injure other people.

2) One ought to help other people.

3) One ought to work efficiently.

4) One ought to tell the truth.

5) One ought to keep one's promises.

6) One ought to show courage.

Consequently, one can imagine a set of theoretical propositions about the fulfilment of the principles, for example:

1) A person, A, does not injure other people.

2) A person, A, helps other people.

...

6) A person, A, shows courage.

Moreover, such statements as the following ones are meaningful:

1) A is a morally good person, since he has a disposition not to injure other people.

2) A is a morally good person, since he has a disposition to help other people.

...

6) A is a morally good person, since he has a disposition to show courage.

Some "moral theories" or "moral criteria", on the other hand, would be meaningless, linguistically unthinkable. If somebody uttered the statement "an action, H, is morally good if and only if it increases the number of white stones in Scania", one would suspect that he is joking, has no command of English or is crazy.

Other theories or criteria are thinkable and linguistically meaningful but unreasonable, for example, "A is a morally good person, since he has a disposition to vote for the syndicalists".

The established use of language thus determines some limits to the arbitrariness of moral reasoning.

The theories and criteria of moral goodness compete with each other. When making a moral judgement, a person can "pick up" some of them. For example, he points out the peaceful disposition and helpfulness of a person and concludes that this person is morally good. He decides then not to use the other criteria (e.g., willingness to work, disposition to tell the truth, etc.) when making moral evaluations, either in a concrete case or at all. He may also point out the fact that an action fits a certain calculus of preferences and conclude that his action is both good and obligatory. He decides then not to pay attention to other normative theories, basing moral goodness and obligatoriness on happiness, established practices, etc.

4. THE MEANING OF PRACTICAL STATEMENTS.⁶

These reflexions on moral theories and criteria enable one to develop a conception of the meaning of practical, in particular moral, statements. Such statements have both a certain practical and a certain theoretical meaning.

A practical statement, i.e. a norm-expressive statement or a value statement, has, first of all, a *practical meaning*.

Most elementary norm-expressive statements qualify a human action as prescribed (obligatory), permitted, or prohibited (forbidden). From another point of view, norm-expressive statements qualify a human action as conforming to or violating the norm in question. The most important function of a norm-expressive statement is to affect people, that is, to bring about some actions and suppress others. A norm-expressive statement is thus a reason for action. Suppose that a person, A, seriously claims that H ought

⁶ *Ibid.*, pp. 99 ff. (and the English version, *On Law and Reason*, *supra* sections 2.6.4-2.6.6.). Cf. A. Peczenik and H. Spector, *A Theory of Moral Ought-Sentences*, ARSP 1987, pp. 441 ff.

to be performed and that no overriding reasons tell against performing H. A has then a disposition both to wish that H is performed and to actually perform H, if an opportunity exists. It would be strange to seriously claim that H ought to be performed, to admit that no overriding reasons tell against performing H, and yet to wish that H is *not* performed. It would also be strange not to actually perform H, given the opportunity. In such a case, one would doubt whether the normative claim is serious.

A value statement characterizes an object as good, bad, beautiful, ugly, etc. It expresses a value judgement. Among other things, it expresses or encourages approval or disapproval of the object in question. It is also a reason for action. Suppose that a person, A, seriously claims that H is a morally good action and that nothing incompatible with H is better. It would then be natural for A to have a disposition both to approve of H and to perform H, if an opportunity exists.

Another important property of the meaning of most, if not all, practical statements is that they *may be justified*.

There are many ways to justify practical statements. Let me mention three: one based on the causal relation between goals and means, another supported by weighing and balancing of various principles, and the third one based on the logical relation between practical and theoretical statements.

Let me discuss only the third one. Can a practical statement follow from a set of premises *solely* consisting of theoretical propositions?

I will discuss here only *moral* norms and value-statements, thus leaving aside the problem of whether other practical statements have the same properties.

As pointed out above, there exists an established moral language; in other words, one can meaningfully proffer some facts as criteria for deciding whether an action is good and/or obligatory. Theoretical propositions about these facts are thus provisional (*prima facie*) reasons for practical statements.

Let me now express some theses about the logical connection of moral statements with such ought- and good-making facts. The theses are expressed with the help of the following symbols. 'Ought_{pf}H' means that an action, H, is *prima-facie* obligatory. 'Good_{pf}H' means that H is *prima-facie* good. The symbols 'p₁-p_n' indicate the facts that meaningfully can be proffered as reasons for the conclusion that an action is good and/or obligatory. The following theses are logically (necessarily) true:

(1) If p₁ or p₂ or, ... p_n, then it is reasonable that Ought_{pf}H
and

(1*) If p₁ or p₂ or, ... p_n, then it is reasonable that Good_{pf}H

Moreover, the fact that an action *simultaneously fulfils all the claims made by all thinkable moral theories and criteria* of this kind is a sufficient condition for the conclusion that the following practical statements are reasonable: (a) the action in question is *definitively* (not merely *prima-facie*) good; and (b) the action in question ought definitively to be performed.

Let the symbol 'Ought_{ac}H' mean that the action, H, is definitively (all things considered, not merely *prima-facie*) obligatory, and the symbol 'Good_{ac}H' indicate that H is definitively good.

I assume now that the following theses are logically true:

(2) If p_1 and p_2 and ... p_n , then it is reasonable that Ought_{ac}H

(2*) If p_1 and p_2 and ... p_n , then it is reasonable that Good_{ac}H

Another relation of moral goodness and obligatoriness to good-and ought-making facts is less controversial, since it allows one to avoid difficult problems connected with a derivation of practical statements from theoretical propositions. It is thus reasonable to assume that an action fulfilling *the most important* moral theory or criterion is (definitively) good and obligatory.

Let the symbol 'pv' indicate the statement that the action in question fulfils claims made by the most important moral theory or the most important moral criterion. I assume that the following theses are logically true:

(3) If pv, then it is reasonable that Ought_{ac}H

and

(3*) If pv, then it is reasonable that Good_{ac}H

Though the symbol 'pv' refers to a theoretical proposition about the existence of some facts, these facts are selected on the basis of evaluative deliberations. The discussed inferences thus do *not* constitute a step from a purely theoretical set of premises to a practical conclusion.

The following theses elucidate the step in the other direction, from practical statements to theoretical propositions:

(4) If Ought_{ac}H, then p_1 or p_2 or, ... p_n

and

(4*) If Good_{ac}H, then p_1 or p_2 or, ... p_n

Consequently, it is logically inconsistent to say that the action in question is definitively good or such that it definitively ought to be performed, yet it does not fulfil claims made by any, not even a single, meaningful moral

theory or criterion. One can thus deduce an alternative of theoretical propositions from a practical statement! To this extent, our discussion supports the case of moral cognitivism. But the support is rather weak, since we cannot tell *which* moral theory or criterion must be fulfilled to make an action good or obligatory.

5. WEIGHING AND BALANCING OF PRINCIPLES⁷

Some criteria of the morally good correspond to some moral *principles*. The choice of criteria is then based on *weighing and balancing* of principles.

Norms are either rules or principles. The word "principle" is ambiguous. It can designate a general norm, an important norm, a norm that establishes a certain ideal, etc. I will discuss only the least meaning of the word.

If one is in a situation regulated by a *rule*, one has only two possibilities: to obey the rule in question or not. The rule thus establishes a borderline - precise or vague - between the obligatory and non-obligatory, the forbidden and permitted etc. If an action or a state of affairs is on the right side of the borderline, the norm is obeyed, no matter how close to the limit it is.

The Swedish Road Traffic Decree, Sec. 64, thus stipulates that the speed of a vehicle in a built-up area should not exceed 50 kilometres per hour. In the light of this provision, it does not matter whether one drives at the speed 49 kph or 20 kph. In both cases, one drives correctly.

A principle, on the other hand, establishes an ideal. The ideal can be carried into effect to a certain degree, more or less. The higher the degree of realization of the ideal, the better it is from the point of view of the article.

Ch. 1 Sec. 2 of the Swedish Constitution (The Instrument of Government, *Regeringsformen*) thus stipulates as follows: "The public power shall be exercised with respect for the equal value of all human beings and for each individual person's freedom and dignity." The greater the respect for equality, freedom and dignity, the better it is from the point of view of the provision.

In fact, the provision expresses *three* principles:

- 1) Those in power shall respect the equal value of all people.
- 2) Those in power shall respect the freedom of each individual.
- 3) Those in power shall respect the dignity of each individual.

Each principle expresses an ideal, a *value*, for example, it stipulates that equality, freedom and dignity are valuable.

⁷ *Ibid.*, pp. 43 ff. and 92 ff. (and the English version, *On Law and Reason*, *supra* sections 1.4.2. and 2.5.4.).

Principles can collide with each other; for example, a doctor's disposition to tell the truth can in some cases harm his patient. One must not pay too high a price for the truth. Consequently, one has merely a *prima facie* duty to follow the wording of the principles.

Logically incompatible actions can be, at the same time, *prima facie* good. One can also simultaneously have a *prima facie* duty to perform logically incompatible actions. The "normal" logic is thus not applicable to moral *prima-facie* statements. Suppose, for example, that A killed B. One *prima-facie* reason, for instance, the circumstances of his act may justify life imprisonment for A; another, for instance, A's mental condition, may support a milder penalty.

At the same time, one has a definitive duty to follow the best compromise, achieved through *weighing and balancing* different principles. One must, for example, aim at the best weighing and balancing of freedom and equality. One shall thus see to it that, for example, a small increase of equality does not cause a too great limitation of freedom; nor shall a small increase of liberty be "paid for" by too great inequality.

What does it mean that one has a definitive duty (in other words, "an all things considered duty") to perform an action, H? (1) This expression indicates that if one can, one ought to perform this action, regardless of counter-arguments. When recognizing one's definitive duty, one declares that one is no longer prepared to pay attention to reasons which justify the contrary conclusion. (2) From another point of view, the statement "one has a definitive duty to perform the action H" implies that one would regard H as obligatory, if one had complete information about all morally relevant circumstances.

One can thus regard principles as *commands to weigh and balance*.⁸ The principle of equality thus does not demand the greatest possible equality, but merely the greatest equality compatible with a sufficient degree of fulfilment of other principles.

As soon as one claims that a certain reason weighs more than another, one faces the question "why?". The answer can be supported by further reasons. These, too, can be weighed and balanced against thinkable counter-reasons. From the logical point of view, the process of weighing can thus continue *ad infinitum*. But in practice, one must *finish* the reasoning, sooner or later. If one does wish to be engaged in circular reasoning, one must take the "last", ultimate reason for granted, without further reasons.

⁸ Cf. R. Alexy, *Grundrechte*, Baden-Baden, 1985, pp. 72 ff.

6. DISCIPLINARY MATRIX OF LEGAL REASONING

The law-giver compares the weight of several principles and thus creates some more or less exact rules, telling one what to do. Whereas one can say that each principle expresses a single value, a rule is often a compromise of many values (and corresponding principles). In contrast to morality, which mostly consists of principles, *the main part of the law thus consists of rules*. This restricts the need for weighing and balancing. Only in so-called hard cases, not in the routine cases, must one perform an act of weighing, in order to state precisely whether a given legal rule applies or not.

In consequence, legal reasoning is more "fixed", less arbitrary and thus more predictable than moral reasoning. In legal reasoning, one thus has access to a more extensive set of premises, such as statutes, other sources of the law and reasoning norms.

One may elucidate the character of legal reasoning in the light of a (duly modified) theory of science.

The modified theory of science is, first of all, fruitfully applicable to *legal dogmatics*.

There are many different types of legal research. Such disciplines as history of law, sociology of law, law and economics, philosophy of law, etc. apply, first of all, a historical, sociological, economical, philosophical or other *non-legal* method. But legal dogmatics, occupying the central position in commentaries and textbooks of law, etc., implements a specific legal method.

To a certain degree, the modified theory of science is also applicable to judicial and other legal practice, since its methods of reasoning are fairly similar to those characterizing the legal dogmatic.

According to Aulis Aarnio, the *disciplinary matrix* of legal dogmatics consists of four components which I shall now discuss. Each legal *paradigm* contains a particular interpretation of this disciplinary matrix.⁹

I. A lawyer works with a set of philosophical background presuppositions, *inter alia* the assumption that legal reasoning is based on valid law.¹⁰

⁹ A. Aarnio, "Paradigms in Legal Dogmatics", in A. Peczenik, L. Lindahl and B. v. Roermund (eds), *Theory of Legal Science*, Dordrecht/ Boston/ Lancaster, 1984, pp. 25 ff.

¹⁰ Re the sources of the law, cf. A. Peczenik, *Rätten och förnuftet*, 2nd ed. *supra* at pp. 237 ff. (and the English version, *On Law and Reason*, *supra* chapter 5.).

II. A lawyer also makes some presuppositions concerning the sources of the law. All texts and other things (e.g. practices) must, should or may be proffered by a lawyer as authority reasons, or be taken for granted as such reasons, are *sources of the law*.

One thus proffers an *authority reason* when stating that a certain legislative, judicial or other decision ought to be made because of circumstances other than its content. An authority reason may thus be based upon the fact that a court previously settled a dispute in the way one now argues for. The conclusion thus follows from a set of premises, containing a statement that ascribes certain authority to a certain person (possessing, for example, extraordinary moral qualities), a certain official position (such as being a judge), a procedure (such as the legislative or judicial process, etc.)

Some texts and other things (e.g. practices) are sources of the law, others are not. One cannot imagine a legal system without authority reasons, that is, without sources of the law. One can also draw a distinction between some sources of the law (or some authority reasons) that are and others that are not binding. Only the former *must* be proffered as authority reasons. Furthermore, some sources of the law, though not binding, have a particular authority, not much less than statutes. Although not binding, they *guide* legal practice. Precedents, legislative preparatory materials and some other sources play precisely this role in Sweden. It follows that one can distinguish between binding, guiding and permitted sources of the law. One must proffer the first category, *should* proffer the second and *may* proffer the third as authority reasons.

The established norms concerning the sources of the law, in brief source-norms, have the following character. They determine the position various sources of the law have in the legal system. They can be used as premises of logically correct inferences concerning the law. They constitute a kind of customary law. Lawyers perform reasonings in a way that suggests that they - consciously or not - follow these norms. Moreover, these norms are related to the concept of legal reasoning. It would be strange to *simultaneously* refute a significant part of the set of such norms and still try to perform *legal* reasoning. But in a concrete situation, one may disregard these norms, if sufficiently strong reasons justify it.

The Swedish doctrine of the sources of the law is very flexible and complicated. It thus differs from the view defended by, for instance, the french exegetical school of the 19th Century, that all legal questions are to be answered by recourse to statutes.

The most important source-norms in Sweden have the following content.

When performing legal reasoning, one *must* use statutes and other regulations as authority reasons, if any are applicable.

The duty to use statutes and other regulations in the justification of judicial decisions does not necessarily imply that a court must explicitly quote them. But it must be at least implicitly clear what the statutory framework of the decision is. If a statute disregards some problems, such as the question of remoteness of damage, a court would often neglect to cite a specific provision of a statute. But if a statutory regulation is directly applicable, it would be a grave mistake not to follow it.

A statute or other regulation can decide that some other sources of the law, for example, a custom or a contract, *must* also be applied within legal reasoning.

When performing legal reasoning, one *should* use precedents and legislative preparatory materials as authority reasons, if any are applicable. One *should* also use international conventions, underlying the applicable national legislation, together with preparatory materials and other interpretatory data concerning these conventions. One also *should* use some customs, well-established in the society, expressing general principles or accepted by previous decisions of the courts or authorities. Finally, one *should* use applicable "general recommendations" issued by various authorities and public institutions, such as the National Tax Board, Bookkeeping Board, Consumer Authority, etc.

This fact reflects a highly organized character of Swedish society, where several public or semi-public organizations demand and often receive high respect.

When performing legal reasoning, one may use *inter alia* the following material:

- a) Some customs (so far it does not constitute a must- or should - source of the law, see S1 and S2).
- b) Some quasi-legal norms, issued by various private or semi-private institutions. (One may here mention the Press Ombudsman, the Press Opinion Council, the Radio Council, the Trade and Industry Stock Exchange Committee, Sweden's Bar Association, etc.)
- c) Professional legal literature (e.g., handbooks, monographs, etc.).
- d) Precedents and legislative preparatory materials which do not directly touch upon the legal text being interpreted but give information on evaluations in adjacent areas of law.

- e) Judicial and administrative decisions which are not reported in the leading law reports, NJA (and therefore do not have the same standing as the precedents published in NJA).
- f) Draft statutes.
- g) Repealed statutes, provided that they give information about evaluations that are still current.
- h) Foreign law, unless incompatible with some overriding reason, such as *ordre public*.
- i) Other materials constituting evidence of well-established evaluations, for example, private pronouncements by members of various legislative drafting committees, members of Parliament, ministers, etc.

III. A lawyer also makes some assumptions concerning legal method. One thus assumes that legal reasoning is and should be governed by some methodological norms.

Let me give some examples. All courts and authorities must use statutes in the justification of their decisions, if any are applicable. They should use applicable precedents and legislative preparatory materials. One should not construe extensively provisions imposing penalties, taxes or other burdens on a person. When an earlier statute is incompatible with a later one, one must apply the latter. When interpreting a statute, one must pay attention to its purpose.

IV. Finally, a lawyer endorses a set of values, first of all concerning legal certainty and justice. *Legal certainty* is the fact that legal decisions follow a reasonable compromise between predictability and other moral considerations.

The term "legal certainty" is a literal translation of the German word *Rechtssicherheit*. The English legal terminology has no corresponding word although, of course, the actual phenomenon of legal certainty is as important in the Common Law systems as elsewhere.

People commonly expect legal certainty. The expectation has the following consequences:

1. Courts and authorities have a duty to support their decisions with legal norms. If no statutory provision applies to the case under consideration, one must support the decision with other authority reasons, such as precedents, legislative history, competent juristic literature, etc.

This duty permeates the conceptual apparatus of lawyers. Many lawyers understand the concept of legal reasoning in a way that supports the follow-

ing thesis: if decisions in a given kind of case are made without any support from authority reasons, these decisions are, by definition, not legal.

2. No doubt, predictability resulting from the fact that legal decisions are based on general norms is morally justifiable on the principle that "like should be treated alike". In some cases, however, the wording of the law clashes with moral opinions of its interpreter. Like should be treated alike; but the text of the law lays down one set of criteria of likeness, whereas the interpreter has reasons to prefer other criteria. In other words increased predictability, based on the wording of the law, may mean that the decision in question pays less attention to other moral considerations. Courts and authorities must thus use special interpretive methods to adapt legal norms to moral requirements.

This duty, too, affects the conceptual apparatus of lawyers. One can understand the concept of legal reasoning in a way that supports the following strong theses: if decisions in a given kind of case are made without any attention to the established juristic tradition of reasoning, these decisions are, by definition, not legal. If they are made without any attention to moral considerations, they are, by definition, not legal, either.

7. THE MAIN PROBLEM: KNOWLEDGE, TRUTH AND RIGHTNESS IN LEGAL REASONING

The complexity of legal reasoning, indicated by the ideas of legal paradigm and legal certainty, is a reason for some philosophical controversies concerning evaluation of their *rightness*.

The question of rightness is the same as that of *justification*. "Justification" is defined as giving sufficient reasons for a conclusion. But what reasons should one regard as sufficient?

This is a normative question. Such questions belong to the so-called context of justification. One must distinguish it from descriptive questions asked in the so-called context of discovery, such as: What factors caused a given outcome of a legal dispute? What reasons do the lawyers actually regard as convincing?, etc.

Reasons sufficient for a lawyer may be insufficient for a moralist, a political opponent, a philosopher, etc. The latter three might demand a justification of premises that the lawyer takes for granted. Juristic conclusions, judicial decisions and the like can thus be justified either:

- a) within the framework of legal reasoning (in other words, within the established legal tradition, or the juristic paradigm) or
- b) outside it.

The former is *contextually sufficient legal justification*. It draws support from such premises as:

- statutes, precedents and other sources of the law;
- traditional legal reasons, such as statutory analogy;
- various legal methods, such as teleological interpretation of statutes;
- traditional reasoning norms, e.g., if an earlier statute is incompatible with the later, one shall apply the latter; and
- legal value judgements, concerning, e.g., legal certainty, justice, reasonableness etc.

The latter can be a *deep (fundamental) justification* which provides support or criticism for the premises that the lawyer takes for granted.¹¹

I shall here disregard a possibility of justification of another type, for example, historical.

Various parts of the legal tradition may thus - for various purposes and in various contexts - require deep justification. For example, the question, "Why shall we follow the Swedish Constitution?", makes no sense if asked during a legal trial. The court simply takes for granted that one should do it. On the other hand, the question may be pertinent at a political meeting where one answers an objection posed by an Anarchist.

The deep justification of legal reasoning faces difficult problems.

- 1) This form of reasoning presupposes apparently incompatible theses:
 - a) When one performs legal reasoning and seriously utters value judgements and norms, one assumes that these are right. The statement "I am arguing for p although p is not right" is strange. Even a liar hopes that others will believe that what he says is right; otherwise, why should he say it at all?
 - b) Yet, persons performing legal reasoning often admit that incompatible value judgements and norms may be possible and acceptable, without being absolutely right. From this point of view, legal reasoning is similar to practical advice; When Peter recommends holidays in Las Palmas ("because the climate is warm and the night life exciting") and John recommends holidays in Alaska ("because one can hunt and fish"), neither of them needs to assume that the other is wrong. One person may simply think that the other has different tastes.
- 2) Legal reasoning constitutes a peculiar mixture of two different, ideally distinguishable, components. The first is a description of the sources of the law, established evaluations, traditional legal reasoning norms, etc. The second is a continual creation of value judgements that tell one whether to follow these sources, evaluations and norms or not. The first component is not enough, cf. above about legal certainty. Let me give an additional example. Section 4 of the old Swedish Constitution (The Instrument of Government,

¹¹ Cf. A. Peczenik, *The Basis of Legal Justification*, Lund, 1983, p. 1.

Regeringsformen), derogated as late as 1969, stipulated that "the king has the right to govern the realm alone". The norm actually applied was, instead, "The *Government*, responsible to Parliament, has *executive power*". Could one *read* the word "King" as meaning "the Government responsible to Parliament" and the words "the right to govern the realm alone" as meaning "executive power"? Yet, legal reasoning is expected to give us knowledge of the law, often identified with the sources of the law.

The following diagram illustrates this situation:

"own" norms and value judgements, endorsed or made by the person performing legal reasoning	AND	the sources of the law and established reasoning-norms; value judgements established in the society	GIVE	knowledge of valid law or of juristic meaning of the sources of the law
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This creates a puzzle. In what sense, if any, can a legal interpretive statement be right? To say that a theoretical proposition is right is the same as to say that it is *true*. Can a legal interpretive statement then be true, even if regarded as a practical statement, and justifiable by a set of premises containing a norm or a value judgement? It is difficult to see how practical statements, ultimately based on one's feelings (cf. above), can give one true knowledge of the law. Or can a legal interpretive statement be right in any other sense? One must thus choose one or more of the following ways to characterize legal reasoning:

1. Legal reasoning that deviates from the wording of the law is *unjustifiable*, wrong, irrational, etc. But this thesis is unacceptable, since it contradicts centuries of social practice. How was it possible that generations of lawyers let a wrong method determine their work?

2. Legal reasoning is deeply justified and right, if it gives *true knowledge*. One may here distinguish between two versions:

a) Legal reasoning is deeply justified and right, if it gives true knowledge of the special *expert meaning* of the sources of the law. This thesis has the advantage of reducing the problem of rightness to the well-known idea of truth. But, again, how can a legal conclusion be true, even if it is justifiable by a set of premises containing a norm or a value judgement?

One must also explain why the same words and expressions have an "expert-meaning" when occurring in the law and a different meaning when occurring elsewhere.

b) Legal reasoning is deeply justified and right, if it gives true knowledge of the *real valid law*, not identical with the sources of the law. This thesis has the same advantage and disadvantage as 2a *supra*. Furthermore, it is not clear what the "real valid law" actually is. Where does it exist, if not in legal texts? If it is unwritten, what is the mode of existence of the unwritten law?

3. Legal reasoning is deeply justified and right, although it *does not give true knowledge*. To be sure, it has the support of some value judgements and norms, but these are continually created by the person interpreting the law. Legal reasoning thus *transforms* the established law into something else, that is, *the interpreted law*.

I will argue for the third way of characterizing legal reasoning. But what does it mean that legal conclusions can be right although not true? One needs a theory of rightness, not identified with truth.

One can also say that legal (interpretive) conclusions are true propositions about the interpreted law. But this leads to the following difficulty. The interpreted law is created exactly at the moment of interpretation. On the other hand, true propositions are true because they correspond to something *pre-existent*. The discussed view thus implies the strange idea that interpretive conclusions are true, because they correspond to ... themselves.

8. THE ULTIMATE JUSTIFICATION OF LEGAL REASONING

How can one know that a moral or a legal conclusion which thus rests on an arbitrary assumption is right? Let me begin with a hypothesis that rightness and justificatory force have something to do with *coherence*.

Philosophers face great difficulties when attempting to formulate precise criteria of coherence. Instead, one often characterizes a coherent set of statements metaphorically as "tightly knit unit" etc. In any case, coherence is more than logical consistency. Physics and chemistry, for example, are mutually coherent, whereas physics and religion are not, even if they do not contradict each other.

In both moral and legal reasoning, one may utter a very great number of statements. The same statements can be included in various inferences, sometimes as assumed premises, sometimes as conclusions. *A conclusion is thus supported by a set of reasonable premises, further supported by other sets of reasonable premises, and so on. When many such chains of support exist, one obtains an interconnected network of statements. In this way, a*

great number of statements hangs together. In other words, there exists an *extensive and complex supportive structure*.¹²

In this context, one needs a precise definition of the concept of support. The statement *p* supports the statement *q* if, and only if, (1) *p* belongs to a set of premises, *S*, from which *q* logically follows; and (2) *q* does not follow from *S*, if *p* is removed from it; and (3) *S* consists solely of certain premises; premises presupposed (taken for granted) within a particular practice belonging to the culture under consideration; proved premises; and/or otherwise reasonable premises.¹³

This conception deals only with coherence of statements. I leave aside such things as coherence of music, paintings, etc.

Some influential theories of coherence seem to be special cases of our conception. One may divide them into two classes. The first assumes that some general statements create coherence of less general ones they support.

The second assumes, conversely, that particular data-statements create coherence of general theories they support.

According to Neil MacCormick's conception of normative coherence in the law, some principles support a number of legal rules, thus making them coherent. This emphasis upon general principles is understandable, since the author is oriented towards coherence in the practical area of law.¹⁴

Nicholas Rescher, discussing coherence of theoretical propositions, chooses the opposite path. A proposition is true if and only if it follows from consistent data. But the total set of accessible data is inconsistent. A historian, for instance, receives conflicting reports from diverse sources. An organism receives conflicting data from imperfect sensors. A scientist obtains inconsistent data, depending on which of the competing theories of scientific method he applies, and so on. Rescher thus determines various maximally consistent subsets inherent in the (inconsistent) set of data. Some of those are to be preferred. A proposition, *p*, maximally coheres with data, if it invariably follows from all preferred maximally consistent subsets of data.

¹² Cf. A. Peczenik, *Rätten och förnuftet*, 2nd ed. *supra* at p. 149 (and the English version, *On Law and Reason*, *supra* section 3.5.1).

¹³ Cf. A. Peczenik, *ibid.*, 2nd ed. *supra* at pp. 109 ff. and 129 ff. (and the English version, *On Law and Reason*, *supra* sections 2.7. and 3.2.).

¹⁴ Cf. N. MacCormick, "Coherence in Legal Justification", in A. Peczenik, L. Lindahl and B. v. Roermund (eds), *Theory of Legal Science*, Dordrecht/ Boston/ Lancaster, 1984, pp. 235 ff.

This is also a special case, fitting our conception of coherence: one can thus say that the preferred subsets of data support this proposition.¹⁵

Ronald Dworkin's theory of "integrity" (that is, coherence) of law includes MacCormick's idea that principles make rules coherent. But Dworkin admits all kinds of support. He compares the lawyer with a novelist, participating in writing a novel *seriatim*. Each novelist, and each lawyer, aims to make his additions fit the material he has been given, the predictions of what his successors will want or be able to add to it, and his substantive value judgements.¹⁶ In our terminology, this means that the lawyer aims at constructing a structure in which the already established law, the predictions of its future interpretation and his substantive moral judgements strongly support each other.

The more coherent the set of premises supporting a given conclusion, the better justified is the conclusion. The more coherent the set of premises supporting a given legal reason, the stronger is the reason.

A theory can thus be coherent with (that is, supported by) observational data. One theory can be coherent with another. Legal rules can be coherent with some moral principles. A statutory interpretation can be coherent with some precedents and other sources of the law, and so on.

Philosophy of science provides some criteria of coherence. For example, a non-falsified (more precisely, a corroborated) theory in Popper's sense is coherent with observational data. In other words, the data support the theory. Various scientific theories are coherent with, and thus support, each other, if they evolved in connection with the same paradigm.

But more precise criteria of coherence are not so general. It is easier to agree about various *examples* of coherent reasoning than about general definitions. If one wishes to gather examples of coherent juristic theories and reasoning, one should read leading works in legal dogmatics, not in jurisprudence.

This observation is quite natural. In the law, one often implements weighing and balancing in order to create a coherent set of value judgements and norms. Weighing and balancing ends with a singular insight, not supported by any general statements.

In this context, let me mention the well-known term "narrative coherence". This term is notoriously obscure. Sometimes, one uses it to designate coherence of theoretical propositions in general. Sometimes, however, it

¹⁵ Cf. N. Rescher, *Coherence Theory of Truth*, Oxford, 1973, pp. 169 ff.

¹⁶ Cf. R. Dworkin, *Law's Empire*, London, 1986, pp. 225 ff.

only applies to coherence of a story, a novel, etc. In the latter context, one often emphasizes the singular, unique character of each coherent whole. But in all such contexts, nothing tells against regarding narrative coherence as supportive structure.

9. COHERENCE OF LEGAL REASONING

The demand for coherence in legal reasoning is twofold. First, legal reasoning has extensive support from statutes, other sources of the law and traditional reasoning-norms. Second, it has extensive moral support, in three different ways. Some moral principles support legal rules, for example, the principle of restitution underpins the law of torts. In other words, a number of legal rules determining, *inter alia*, conditions and character of compensation, follows from the principle "damage should be compensated" together with a set of certain, presupposed, proved and otherwise reasonable premises. Moral principles underpin, too, some legal reasoning-norms. The norm allowing for the use of statutory analogy in private law thus follows from the moral principle "like shall be treated alike" together with a set of premises stating precisely which cases are relevantly similar. Finally, morality supports the law as a whole. The *Grundnorm* "the law ought to be observed" thus follows from a set of reasonable premises expressing the vague idea that order is better than chaos. Moreover, the set of moral norms, thus supporting the law, is coherent in itself, that is, extensive and exhibiting a complex supportive structure. The morality of any human being is thus adapted to judge a great number of situations occurring in life, and to give a chain of reasons for the judgement. Life is so rich that only a superman, or a fanatic, could hope to reduce his morality to a small number of precise norms.

This duality corresponds to the idea of legal certainty as an *optimum* of predictability and moral acceptability; see above.

Let me give some more detailed examples of coherence in the law, starting from a brief discussion of logical, literal and systematic interpretation of statutes.¹⁷

The term "logical interpretation of statutes" suggests that one draws logical conclusions from the statute considered. Among other things, one checks whether the statute is logically consistent. Consistency is the most fundamental requirement for rationality, and a necessary condition of coherence.

¹⁷ Cf. A. Peczenik, *Rätten och förnuftet*, 2nd ed. *supra* at pp. 283 ff. (and the English version, *On Law and Reason*, *supra* section 6.2.).

The term "logical interpretation of statutes" also covers questions of subsumption. In hard cases, subsumption consists in deducing the conclusion from a set of premises comprising the statute and the description of the facts of the case together with some additional reasonable statements.

The following reasoning norm emphasizes the importance of subsumption:

Every judicial decision of an individual case, and every juristic recommendation of such a decision, must be logically derivable from a general norm, along with further reasonable premises.

Such a general norm may be stated in a statute, based on a precedent or supported by another source of the law. Support by general norms is an important sign of coherence of a set of judicial decisions.

Systematic interpretation of statutes includes *inter alia* the following arguments:

- 1) the use of a statutory provision for interpreting another such provision;
- 2) interpretation influenced by the systematics of the statute;
- 3) interpretation influenced by another type of conceptual analysis;
- 4) interpretation influenced by other legal dogmatic theories.

One must thus mention the following reasoning norm:

When interpreting a statutory provision one must pay attention to other provisions which:

- a) are necessary in order to make the answer to the legal question considered more complete;
- b) deal with cases relevantly resembling those the provision being interpreted regulates;
- c) in any other way contribute to an understanding of the provision being interpreted.

The following examples elucidate this reasoning norm:

- a) In order to be able to apply a penal provision one must also pay regard to other statutory norms which answer the question as to how criminal responsibility is affected by, for example, mental illness or other grounds for diminished responsibility.
- b) Frequently, an old statute is interpreted in a way adapted to new enactments which regulate similar questions. In this manner the remaining rules in the Swedish Commercial Code of 1734 can by means of interpretation be adapted to the Contracts Act, Sale of Goods Act, and so on.
- c) Various expressions in statutes often form a kind of hierarchy. Cf., for example, the following expressions from the Swedish Sale of Goods Act: "immediately" (secs. 27, 32, 52), "as soon as it can be done" (sec. 6), "without unreasonable delay" (secs. 26, 27, 31, 32, 40, 52, 60), and "within a reasonable time" (secs. 26 and 31). Owing to the fact that these expres-

sions are construed in connection with one another, we see, for example, that the expression "within a reasonable time" refers to a longer period than the expression "without unreasonable delay".

In this manner, a lawyer pays attention to supportive connections between various legal norms, thus interpreting the law as a *coherent* totality.

One may perhaps say the same about the following norm, helping the lawyer to use a systematics of the law as *support* for some conclusions.

When interpreting a statutory provision one may pay attention to:

a) the title of the statute, and

b) the membership of the interpreted provision in a certain part of the legal system, a certain statute and a particular part of that statute.

Ch. 3, sec. 9 of the Swedish Criminal Code reads as follows: "If anyone through gross carelessness exposes another person to mortal danger or danger of severe bodily injury or serious illness, he shall be sentenced for *causing danger to another person* to a fine or to imprisonment for not more than two years." In connection with this provision the question arose as to whether the attribution of responsibility required that a concrete, specified person or group of persons was exposed to danger. The question could be supposed to have been answered in the affirmative since in the Criminal Code the offence has been placed among offences *against individuals*. A number of authors have, however, rejected this interpretation, proffering both substantial reasons and analogies with other provisions.

Finally, let me mention the following norm:

When interpreting a statutory provision one may pay attention to theories formulated in legal dogmatics.

A theoretical reworking of the legal material means that one presents it as a coherent whole, supported by a system of reasons.

The following example elucidates the role of such theories. For a long period, legal dogmatics regarded ownership as resembling a substance. At a certain moment, all the aspects of ownership could belong to one and only one physical or juridical person. Even if several persons were co-owners of the same thing, each had all the aspects of ownership, albeit with regard to a part of the thing only, identified either physically or ideally, for example, in percent. A sale thus resulted in an instantaneous transfer of ownership as a totality: first the seller and then the buyer was a full owner. The only problem to discuss was the precise determination of the moment of this instantaneous transfer. This theory determined interpretation of all statutory provisions on transfer of ownership, including some provisions of inheritance law (cf. Ch. 18 of the Swedish Decedents' Estate Code). On the other hand, according to a newer Scandinavian theory of ownership, to be owner of something is the same as to be legally protected against certain other persons.

Many kinds of protection exist. It is thus possible to be owner in some respects but not in others. This fact gives the newer theory greater flexibility. One can now interpret transfer of ownership as a process, extended in time, in which one person successively acquires more and more aspects of ownership. At a certain moment, a buyer or an heir can thus already be owners in one respect, while other aspects of ownership are still ascribed to the seller or the dead person's estate.¹⁸

Different kinds of systematic interpretation of statutes affect each other. Construction of a statutory provision depends at the same time on interpretation of other provisions, systematics of the statute, conceptual analysis and theories formulated in legal dogmatics. A preliminary and vague understanding of connections between various provisions and their place in the legal system together with a conceptual analysis may thus influence theories of ownership. These affect a deeper understanding of the place of the provision being interpreted in the legal system and a deeper analysis of the relevant concepts. One can, for instance, argue in favour of a thesis concerning the connections between various provisions by showing that this thesis is supported by (coherent with) a theory formulated in legal dogmatics. On the other hand, one can argue in favour of the theory by showing that it is supported by the thesis concerning the connections. If there is no coherence, one can modify either of the components.

One may thus modify and mutually adapt various forms of systematic interpretation in order to achieve a balance, resembling the well-known phenomenon of "reflective equilibrium".

In this connection, one may also speak about another well-known idea, the so-called "hermeneutic circle"; the whole juristic content of a given cluster of legal norms can only be understood if one understands their mutual connections, the relevant legal concepts, legal theories, etc., while these connections, concepts and theories in their turn can be understood only by understanding the content of the legal norms.

All this hangs together: interpretation of statutory provisions, systematics of the statute, conceptual analysis and theories formulated in legal dogmatics. Various juristic theses support each other. Legal reasoning - and the legal system itself - thus gains coherence and rationality.

The so-called resolution of conflicts between legal norms is another example of coherence in the law.¹⁹

¹⁸ A. Aamio, *Paradigms in Legal Dogmatics*, *supra* at pp. 46 ff.

¹⁹ Cf. A. Peczenik, *Rätten och förnuftet*, 2nd ed. *supra* at pp. 304 ff. (and the English version, *On Law and Reason*, *supra* section 6.6.).

When discussing conflicts between legal norms, one must consider the following distinctions.

A conflict of *rules* occurs when the rules are logically, empirically or evaluatively incompatible.

Two rules are *logically* incompatible if:

- a) one of them commands an action while the other forbids it (a contrary logical incompatibility); or
- b) one of them forbids an action while the other permits it (a contradictory logical incompatibility).

A special form of logical incompatibility occurs in connection with qualification rules. Two such rules are logically incompatible if one of them states that a certain circumstance is necessary and another that it is not necessary for the validity of a certain legal action. Consider the following examples. One rule stipulates that A has a power to make judicial decisions, another one stipulates that he has not. Or, one rule demands the written form for validity of a certain contract, whereas another admits validity of both written and oral contracts of this kind, etc.

If two rules are logically incompatible, one cannot observe (or apply) them simultaneously.

I disregard here some problems concerning permissive rules.

Two rules are *empirically* incompatible if they are not logically incompatible but nevertheless one cannot simultaneously observe (or apply) them for another reason. Suppose there are two rules, one of which obliges A to work daily from 4 a.m. to 4 p.m., the other of which obliges him to work daily from 4 p.m. to 3 a.m.. These two rules are empirically incompatible: A cannot, as a practical matter, work for 23 hours a day.

Two rules are *evaluatively* incompatible, even if one can - logically and empirically - observe (or apply) them simultaneously, where their simultaneous observance (or application) would lead to legally or morally objectionable effects, whereas each norm separately does not lead to such negative consequences. Suppose, say, there are two rules, one of which obliges A to work daily from 8 a.m. to 4 p.m., the other of which obliges him to work daily from 4 p.m. to 11 p.m. A can work for 15 hours a day but the labour law forbids it.

Conflict of *principles* have another character. Following one principle only seldom totally excludes following another. There is rather a competition: an increased degree of following one principle results in a decreased degree of following the other. Assume, for example, that one principle de-

mands justice and another economic efficiency. In some situations, increased justice results in decreased efficiency and *vice versa*.

When a non-jurist, for example, a linguist, considers that two statutory rules are incompatible (logically physically or evaluatively), he can describe this incompatibility and perhaps criticize it, but he cannot set it aside. *Legal* interpretation, on the other hand, has as one of its main purposes that of setting aside the incompatibilities and thus transforming the legal system into a more rational one.

Logical incompatibility violates the demand of L-rationality which constitutes, as stated above, a condition of coherence.

Empirical incompatibility violates the demand of efficiency, that is, it is incompatible with goal-rationality. Goal-rationality can also be regarded as a special case of coherence. When regarding some norms as means to achieve certain goals, one provides them with a teleological justification, that is with a kind of support. The density of supportive relations in the law is the same as its coherence.

Evaluative incompatibility means that the simultaneous obeying of the two norms logically implies violation of a third one, corresponding to an assumed moral or legal value. In other words, it is a kind of logical inconsistency, thus making the system incoherent.

The following conflict norms help the jurists to set aside conflicts between legal norms, and thus to make the legal system more coherent:

Whenever one discovers a conflict of legal norms one should set it aside, either by reinterpreting (and thus reconciling, harmonizing) these norms, or by arranging a priority order between them.

As regards principles, reinterpreting and harmonizing is easier than arranging a priority order. One may thus try to understand, for example, the principles of justice and economic efficiency in such a way as to make it possible to simultaneously fulfil both these principles to a high degree. On the other hand, it would be difficult to justify a priority order demanding, for instance, that justice should always go before efficiency, *fiat iustitia pereat mundus*.

One should interpret different sources of the law, if possible, so that they are compatible. Interpretation of statutes, precedents, legislative preparatory materials, etc. should affect each other.

A reconciliation is thus often more important than the arranging of priority orders.

If strong reasons militate against such a reconciliation, the must-sources of the law have *prima facie* priority before the should-sources and these before the may-sources. If one abandons this priority in an individual case, one should justify one's departure with strong reasons.

One must thus proffer strong reasons for, say, giving precedents priority over a clear statute. No reasons, on the other hand, are required to assign the latter a priority over the former.

When a higher norm is incompatible with a norm of a lower standing, one must apply the higher.

Consider, for example, the following hierarchy of Swedish legal norms:

a) Constitution; b) statutes; c) "other regulations" issued by the Government (on the basis of a parliamentary authorization, as regards enforcement of a statute or as regards matters that, according to the Constitution, should not be regulated by the Parliament); d) "other regulations" issued by subordinate authorities on the basis of authorization, given by the government or by a statute; e) "other regulations" issued by the municipalities; cf. section 5.3. *supra*. This enumeration omits individual norms, such as judicial decisions.

Where an earlier norm is incompatible with a later one, one must apply the later.

One may apply a more general norm only in cases not covered by an incompatible less general norm.

A person making a false income tax return is thus responsible only for a tax offence, according to secs. 2-4 of the Tax Penal Act, but not for fraud despite the fact that his action also fits Ch. 9 sec. 1 of the Criminal Code (concerning fraud).

If a later general norm is incompatible with an earlier but less general norm, one must apply the earlier and less general norm.

If it is not possible to reconcile different precedents, one should determine which are the most important. In so determining, the following circumstances are relevant:

a) Decisions of the Supreme Court have greater authority than those of lower courts.

b) Among the Supreme Court's decisions the most important are those reached in plenary sittings.

c) Old precedents which have not been confirmed by new ones have as a rule less authority than do new precedents.

d) The value of a precedent is diminished if the bench was markedly divided or if the precedent has been strongly criticized.

e) The authority of a precedent is increased if a strong need exists for legal regulation in a given area, e.g., one not covered by sufficiently clear legislation.

f) Published cases have more authority than unreported ones.

g) Cases fully reported in the NJA have more authority than cases summarily reported.

h) An established practice, based on several decisions, has greater importance than a single precedent.

If it is not possible to reconcile different pronouncements in the *travaux préparatoires*, one should apply the following priority order:

- a) reports of relevant parliamentary commissions;
- b) pronouncements of the responsible minister;
- c) other materials.

However, incompatibility results in a decrease of the authority of all the incompatible parts of the *travaux préparatoires*. A pronouncement in the preparatory materials has thus the relatively greatest authority if not questioned by other pronouncements.

If possible, one must harmonize the results of the use of different interpretatory methods. Whenever the use of different methods of statutory construction in a given situation results in incompatibility, one should set it aside by reinterpreting the provision in question.

10. THE REQUIREMENT FOR COHERENT TERMINOLOGY IN THE LAW

An additional dimension of coherence between various theories, normative systems, etc. consists of analogy among their concepts, structures, content, etc. Let me call it the requirement for coherent terminology. Robert Alexy's rationality rule 1.3 (if one uses a predicate about an object, one should use it about other objects similar in all relevant respects)²⁰ is a special case.

The requirement for coherent terminology can be exemplified by some reasoning norms for the literal interpretation of statutes.²¹

Literal interpretation is a clarificatory description of the content of the statute in accordance with ordinary, whether general or legal, linguistic usage. It thus does not improve or change the literal content of the statute. However, one often supplements it by recourse to some reasoning norms, justifiable by recourse to the idea of coherence. *Inter alia*, the following norms belong to this category:

One must not interpret the same words or expressions occurring in different parts of the same statute in different ways unless strong reasons for such an interpretation exist.

²⁰ R. Alexy, *Theorie der juristischen Argumentation*, pp. 234 ff.

²¹ Cf. A. Peczenik, *Rätten och förnuftet*, 2nd ed. *supra* at pp. 281 ff. (and the English version, *On Law and Reason*, *supra* section 6.2.).

This idea of uniform interpretation was expressed in, for instance, the pronouncement of the Council on Legislation on the concept of "business activities" in the Liability for Damages Act (cf. Govt. Bill 1972: 5, p. 635).

Sometimes, however, strong reasons justify a shifting interpretation. The penal-law term "resistance", for example, was not construed uniformly even in the same statute. But the law-giver found the shifting interpretation to be unsatisfactory. This fact affected the new formulation of Ch. 8 sec. 5 of the Swedish Criminal Code.

The following norm, too, exemplifies the requirement for uniform terminology and thus *coherence* in the law:

If different words or expressions are used in the same statute, one should assume that they relate to different situations, unless strong reasons for assuming the opposite exist.

One may perhaps mention here the following reasoning norm:

One must not interpret a statutory provision in such a way that some parts of the provision prove to be unnecessary.

If the statute is perfectly coherent, one can give reasons supporting each part of it. On the other hand, one cannot thus support unnecessary expressions. These remain unsupported and thus disturb coherence of the statute.

By following the requirement for coherent terminology, one ensures a kind of generality of the law. When legal concepts are interpreted in a uniform way, one can thus describe their use in *general* terms. The following conflict norm also expresses the requirement for generality:

Whenever one reinterprets or ranks norms which are in conflict with each other, one should do so in a manner which one can repeatedly use when confronted with similar conflicts between other norms. Strong reasons are required to justify a re-interpretation or a priority order applied *ad hoc*, that is, only in the case under consideration.

11 REASONABLE PREMISES SUPPORTING LEGAL CONCLUSIONS²²

Reasoning norms of this kind are reasonable premises, presupposed within the legal paradigm. In general, there are many kinds of reasonable premises, characterized above as certain, presupposed, proved or otherwise reasonable. Let me now introduce the following stipulative definitions, to some extent corresponding to the ordinary use of language.

²² Cf. A. Peczenik, *ibid.*, 2nd ed. *supra* at pp. 151 ff. (and the English version, *On Law and Reason*, *supra* section 3.5.3.).

"Certain" premises are taken for granted by all people or at least all normal people belonging to the culture under consideration. For example, no normal person doubts such propositions as "here is one hand and here is another", or "the earth existed a hundred years ago".

"Presupposed" premises are taken for granted within a particular practice belonging to the culture under consideration, for instance, within the legal paradigm (cf. above).

Through its relation to "culture under consideration" and "legal paradigm", support depends on a kind of *consensus*.

"Proved" premises follow from a consistent set of certain premises and/or premises taken for granted within the particular practice, such as the legal paradigm. The word "proved" means here "proved within the paradigm", *not* proved in an absolute, philosophically unquestionable way". Not even theories of natural science are proved in the latter sense.

However, most premises, added in order to make the reasoning in the above-discussed example of legal reasoning logically correct, must be called "reasonable, although neither certain, presupposed, nor proved". Though the concept of reasonableness is difficult to define, one may say something like this:

A reasonable premise is neither falsified nor arbitrary. A premise is thus reasonable if, and only if, the following conditions are fulfilled:

1. The premise is not falsified.
2. There is not sufficient corroboration of the hypothesis that this premise does not logically follow from a consistent and coherent set, solely consisting of certain premises, premises presupposed (taken for granted) within a particular practice belonging to the culture under consideration (e.g. in the legal paradigm) and/or, finally, premises proved within this practice or paradigm.

The more attempts to falsify a premise fail, the more reasonable the premise is.

12. COHERENCE, TRUTH AND RIGHTNESS IN THE LAW

Rationality thus depends on both coherence and consensus. Briefly speaking, a legal view is rational, and in this sense right, if it is accepted unanimously by lawyers who think coherently, that is, support their conclusions with an extensive set of certain, presupposed, proved and/or otherwise reasonable premises..

What is the relation between rightness in this sense and *truth*? To answer this question, one must say something about the concept of truth.

Ordinary people understand truth as correspondence between beliefs and facts. A proposition, *p*, is true if and only if *p*. In other words, *p* is true if and only if the facts are such as *p* describes them. This is the classical theory of truth, often called the *correspondence theory*.

The correspondence theory of truth faces, *inter alia*, the following difficulty, emphasized already by ancient scepticists, René Descartes, George Berkeley and many other philosophers. We can report our beliefs. But can we compare them with the facts? The only way to know the facts is to rely upon experience and reason, but how can we know that these sources of knowledge are reliable? If an evil demon consistently deceived us, we could not notice it but would believe in fictions, not in facts. One can thus argue for the conclusion that an individual only knows his own psychical experiences, not facts.

I disregard some more technical difficulties, concerning *inter alia* the alleged impossibility of comparing such different entities as propositions and facts, the impossibility of stating the proposition "*p* is true" at the same level of language to which *p* belongs, etc.

In consequences of such difficulties, many philosophers defend non-classical theories of truth.

According to the *coherence theory* of truth, *p* is true if and only if it belongs to a coherent set of statements. An obvious objection is that even a novel, although not true, can be coherent. A more sophisticated coherence theory of truth claims thus that a true statement must be included in a coherent world-picture, that is, a set of statements covering all fields of life.

The *consensus theory* defines truth as follows. A proposition, *p*, is true if and only if people agree that *p*. The fact that the proposition "the Earth is round" is true is thus the same as the fact that everybody agrees that the Earth is round. An obvious objection is that the Earth was round even when everybody thought it was flat. Jürgen Habermas has thus elaborated a more sophisticated consensus theory of truth. A proposition, *p*, is true if and only if people participating in the ideal discourse (literally located in the ideal speech-situation) would agree that *p*. The ideal discourse would exist if the intellectual communication of people were not impeded by violence and if everybody had the same chance to ask and answer questions, interpret others' views, recommend various actions, etc. Alexy's theory of optimal discourse is a version of Habermas's theory.²³

According to the *pragmatic theory* of truth, *p* is true if and only if, roughly speaking, it is useful to believe in *p*. In other words, *p* is true if the

²³ Alexy, *Theorie der juristischen Argumentation*, *supra* at pp. 134 ff. and *passim*.

belief in *p* helps one to achieve one's goals, etc. Physics, for example, is true because it helps engineers to build machines that work. The obvious difficulty is that even false beliefs can be useful in some situations. For instance, an engineer's belief that God requires of him at least seventy hours work per week would certainly increase his chance of success. A sophisticated theory of truth must thus assume that only true beliefs *invariably* lead to pragmatic success. This assumption is, however, controversial. Generally speaking, one must state the connection between truth and pragmatic success in a very careful way.

Finally, according to the *non-cognitivist* theory of truth, the statement "*p* is true" merely expresses the speaker's positive attitude towards *p*.

The non-classical theories of truth face the following difficulty (analogous to Moore's "open question argument", cf. *supra*). It is meaningful to ask such questions as "To be sure, *p* belongs to a coherent world-picture, but is *p* true?"; "To be sure, *p* would be accepted in an optimal discourse, but is *p* true?", etc. If the non-classical theories correctly reported the meaning of the word "true", such questions would be as meaningless as "To be sure, John is a bachelor but is he not married?" The latter question is meaningless because the word "bachelor" means the same as "a man who never married". The questions concerning truth are, on the other hand, meaningful because the word "true" does *not* mean the same as "coherent", "accepted", etc.

Accordingly, one must, in spite of all the problems, accept the correspondence theory. A proposition, *p*, is true if and only if the facts are such as *p* describes them. This is the meaning of the concept of truth. But not knowing the facts, one may use various auxiliary criteria. These include not only coherence, consensus and pragmatic usefulness but also various theories of rationality and results of research in philosophy of science. The latter include, for instance, the thesis that only a set of true propositions can constitute a *relatively stable and growing theory*. All these criteria constitute (uncertain and incomplete) indications that the proposition under consideration is true, that is, corresponds to the facts. The conclusion "*p* is true" thus follows logically from a set of premises containing such propositions as "*p* is a member of a coherent set of propositions covering all fields of life", "*p* would be accepted in an optimal discourse", "belief in *p* leads invariably to a pragmatic success", etc., together with some other reasonable but complex statements. But the criteria do not constitute a *definition* of truth. But *why* do these criteria constitute indications of truth? Why is, for example, the membership of *p* in a coherent set of propositions an indication that *p* corresponds to the facts? To answer this question, I make the following (not proved but reasonable) assumptions.

1) Some facts are conditions of coherence. In other words, some facts decide that certain propositions *can* be ordered into a coherent set, while others cannot.

2) An important condition of coherence consists in the fact that the propositions in question correspond to the facts.²⁴

Generally speaking, "truth" is an *ontological* concept, that is, a concept presupposing something about the real facts. For that reason, it is doubtful whether norms and value statements, *inter alia* legal interpretive statements, possessing not only theoretical but also practical meaning, can be true. The practical meaning of norms and value statements is partly independent of their theoretical meaning. Definitive (not merely *prima facie*) norms and value statements presuppose weighing and balancing of reasons and counter-reasons, ultimately involving the will and feelings (cf. above).

At the same time, the concept of truth has a certain function in epistemology and philosophy of science, that is, it determines the purpose of such practices as science. The purpose is to tell the truth. Analogically, one can say that the purpose of legal reasoning is to state precisely what is right.

Finally, the concept of truth has a function in formal logic. Logicians thus construct calculi with two values, 0 and 1, where 1 means "true" in the formal sense. In spite of some known objections, I am of the opinion that such a calculus, appropriately modified in formal respects, can be applied to value statements as well.

On the other hand, norms and value statements, *inter alia* in the law, can to a high degree be L-, S- and D-rational, and thus to a high degree fulfil the criteria of truth, *inter alia* the demands of coherence and consensus. Fulfilment of these criteria indicates that they are *right*.

To be sure, one can emotionally reject a set of norms and/or value statements highly fulfilling the criteria of coherence and consensus. But most human beings have a disposition to endorse coherent and generally accepted systems. In this sense, human nature is perhaps rational. I omit the question whether this disposition is determined genetically or merely socially. In any case, *modern* people have a disposition to think rationally.

²⁴ I am grateful to Risto Hilpinen (Turku, Finland) who expressed this idea in an oral discussion.

NARRATIVE COHERENCE AND THE GUISES OF LEGALISM

BERT C. VAN ROERMUND

"Il faut éclairer l'histoire par les lois, et les lois par l'histoire."

Montesquieu, *Esprit des Lois*, XXXI, ii.

Perhaps I am being too sensitive, or too rude: my experience is, anyway, that discussing problems of law or legal theory in terms of *narrative coherence* gets on lawyers' nerves. They become impatient when someone tries to convince them of the quite received opinion that law should be and is presumed to be coherent. They become suspicious when they are asked to learn still another fashionable word for what - if anyone knows - *they* know about coherence in law, fed up as they feel after having swallowed hermeneutic, rhetoric, cybernetic, semiotic, etc. jargon. They even become slightly aggressive, at least in my country, when they hear coherence in law epitomized as 'narrative': for 'nar' in Dutch means 'fool' or 'jester'; and should not law at least be taken seriously?

When notions from a specific branch of contemporary theory of literature, narratology, are introduced into the theory of law, they stand in need of careful, though liberal, philosophical investigation before any profit can be claimed. This entails, as far as I can see, at least two interdependent tasks:¹ to relate the concept of narrativity to a comprehensive philosophy of law, and to use it in the analysis of rich and complex data for such a philosophy.²

1 Cf. Castañeda (1980, p. 13 ff).

2 These tasks are by no means identical. They require flexible co-operation between lawyers and theorists of law (including philosophers) creating and accepting mutual challenges, in spite of their mutual dislike. For philosophy's institutional illness is, as Wittgenstein diagnoses (*Philos. Invest.*, § 593), the one-sided diet of thinking with only one kind of example, while variety of cases is of the essence of law and legal doctrine. On

My intentions in this paper are to offer some incentive, however slight, to both. I want to argue, firstly, why and in what sense a narrative understanding of law is important. My thesis will be that it is important not just to vindicate legalism, but in particular to vindicate proclaimed vindications of legalism that are in fact guises of legalism.³ This main thesis will make it necessary, secondly, to develop a more precise view on the critical potential of the notion of 'narrative coherence' in the practice of law. Thirdly, I shall take just one example from Dutch law to clarify my argument: the file on a squatting case in which the law hides from its own narrative coherence.⁴

1. GUISES OF LEGALISM⁵

Legalism is commonly attacked by pointing out that law is never a *straight-forward* application of an (allegedly properly established) general rule to the (allegedly brute) facts of a case in socio-political life. It is, rather, a complicated judgement, a creative decision, constituted by the mutually dependent processes of building a decidable case and shaping an applicable rule. There are many sophisticated accounts of this complexity.

The view that rule-governed law is not mechanical law was already clearly expressed by those who are believed to have given birth to legalism: the founding fathers of the Code Civil in France. General rules, says Portalis in his *Discours préliminaire* to the Code Civil, necessarily leave gaps, as they

the other hand, the law's institutional pressure is towards instrumentalism and (short term) applicability of whatever concepts can represent the law within a specific political context; thus, it tends to be impatient of philosophical pluralism, circularity, scepticism, etc.

3 Thus, this paper is, basically, an argumentation of a thesis which has been put forward by Jan M. Broekman. See his (1982, p. 145), where it is said that "one man's legal theory is another one's legalism". He emphasized the importance of narrativity in this respect already in (1980, p. 44) cf. (1983, p. 109). See also very recently Foqué (1987). For a narrative understanding of criminal law, joining Broekman's point of view in important respects, cf. 't Hart (1983, pp. 413-470), 't Hart refers, quite justifiedly, to a thrilling philosophical essay on narrating by C. Verhoeven, *Het grote gebeuren*, Utrecht, 1966. The double-bind relation between event and meaning in section 2 of my paper is a main theme in this essay.

4 This file was kindly given to me by my colleague Anton van Kalmthout, who guessed from my vague 'philosophical' indications that this was what I was looking for. I am grateful that he was so right.

5 This section is mainly a redraft of a paper I submitted to the Association for the Philosophy of Law in The Netherlands. Cf. van Roermund (1984).

cannot provide for an infinite variety of cases in the future. These gaps ought to be filled out by decisions of judges, based on common usage, received doctrine, or natural law principles.⁶

But the emphasis that rules are not to be applied mechanically, that they always leave gaps, that they always need a *supplement* of interpretation, is not in itself either a corroboration or a refutation of legalism. It is, in fact, deeply ambiguous. To put it in another way: the motto 'rules are never enough' *may* be just a variant of the motto 'there are never enough rules'. Why can this be the case, and when can it be the case? The answer to the why-question is not that difficult. When a judge appeals to common usage, received doctrine or (natural law) principles, he does so to fill out gaps in a (system of) rules. So whatever he selects from usage, etc. is conceived of in advance as a *part* of the (system of) rules, as far as it has to *fit* within a blank which is rule-governed in at least two senses: (a) it is left open, surrounded by rules; (b) it is moulded by the parameters of these surrounding rules. The appeal to rules as such is never a symptom of legalism; the appeal to the interpretive 'supplement' of rules is never a symptom of the vindication of legalism.

The crucial question here is, in my view, a Wittgensteinian one: if we want to distinguish between a legalistic and a non-legalistic interpretation of rules, assuming that neither of them is mechanical, it is important to know what we mean by this word 'fit' in the relationship between a rule and its interpretation, especially "*what fits what here?*"⁷

We may conceive of the interpretation of rules in a number of ways, which all boil down to this idea: that it is the rule which governs the interpretation (or, for that matter, the action), and not vice versa, and that it does so in virtue of the *fact that it is epistemologically possible* (though cognitively difficult) *to formulate a set of truth-conditions or assertion-conditions on 'fitting'*. The idea is that the judgement whether a particular interpretation or action is in accord with the rule or not, whether it 'continues' the rule or

6 It is, by the way, interesting from a Dworkinian point of view to note that Portalis's term 'natural law' is not equivalent to a set of eternal, universal and necessarily affirmed values, but rather to historical, political and partly institutionalized beliefs about what is, in the final analysis, implied in the efforts of a specific society to give itself a political identity. And this idea of society could very well be mechanical indeed, as Foqué analyzes in his (1987) with reference to the preparatory works to the Code Civil.

7 *Philos. Invest.*, § 537: "So we have somehow read courage into the face. Now once more, one might say, courage *fits* this face. But *what fits what here?*" Cf. §§ 136-138; § 216; p. 183.

not, whether it is a step already foreseen by the rule or not, has its epistemological basis in such a set of truth-conditions or assertion-conditions.

It is well-known⁸ that Wittgenstein rejects this idea with all his philosophical and rhetorical vigour. He shows that it leads into a paradox:

(.....) no course of action could be determined by a rule because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also made out to conflict with it. And so there would be neither accord nor conflict here.⁹

The answer Wittgenstein mentions in his quotation is not the solution of the paradox, but the consequences of it. The solution is much more difficult to formulate, since it goes against the grain of conceptual and propositional thinking as it is commonly conceived of. This common conception is *representationalism*. The wayward antagonist in the *Philosophical Investigations* is, in many cases, the representative of representationalism, beginning with Augustine in Par. 1. Baker and Hacker summarize this position very lucidly:

It is very tempting to conceive of a sign as standing in a projective relation to what it represents. This conception may be variously realized. Frege conceived the *senses* associated with words as determining a reference. The *Tractatus* conceived of the proposition as a logical picture representing a state of affairs. The representing picture, the proposition, was held to include the pictorial relationship, 'the correlation of the picture's element with things' (*Tractatus* 2.1514). *In a like manner*, if one conceives of the meaning of an expression as constituted by the rules, one may think that *the rule* must, in some sense, contain a 'picture' or 'representation' of what complies with it. For understanding an expression must constitute knowing, grasping, the rules that constitute its meaning. Those rules stipulate how the expression is to be used. So by grasping the rules one must grasp how to use, how to apply the expression. But that would only be possible, it seems, if the rule determines independently of us what accords with it. Otherwise, how could I, by grasping the rule, know what to do with the expression the meaning of which is given by the rule (Precisely analogous is the thought that an intention, expectation, or order must contain a 'picture' of its fulfilment). (....) A second great confusion is closely connected with the first. We are inclined to think that it is the mind that infuses symbols

8 Especially since the Wittgenstein renaissance after 1980. For an overview I refer to Parret (1983) and to *Synthese* 58, 1984, no. 3.

9 *Philos. Invest.*, § 201. Kripke (1983) offers a detailed elaboration of why there is such a paradox. Whether his solution has anything to do with Wittgenstein's philosophical *Anliegen* is doubted by Backer/Hacker (1984), on the basis of strong arguments.

with their meaning. And when we realize that there is indeed a gap between an explanation of the meaning of an expression and the use of the expression, it is altogether natural to think that it is the mind that bridges that gap, that effects the connection between a rule and its application. (...) Pricking the bubble of these philosophical flights of fancy is one of the tasks Wittgenstein undertakes in the *Investigations*' discussion of rule-following.¹⁰

In a legal context, this two-fold conception has the name of legalism. Legalism, therefore, is not so much dependent on the idea that rules govern interpretation or actions, as it depends on the idea that they do so in a specific way, or in a very specific relationship with other concepts, such as 'sameness', or 'agreement', or 'usage'. Each of these other concepts may therefore function as the apex of a legalistic framework, even if its role is announced as the definite conqueror of legalism. To rephrase this framework briefly: it presupposes (a) that there is some picture of facts (about the world, about our cognitive attitude, about social conventions of assertability) with reference to which we can make out whether some action is or is not in accord with the rule; and (b) that the mind of the legislator, of the judge, of the citizen is the agent who projects the features of this picture on the action he has to regulate, to evaluate or to generate.

I shall demonstrate, with three examples from contemporary legal theory, how key concepts like 'sameness of type' (Larenz), 'agreement' (Esser) and 'praxis' (Aarnio) are continuously on the edge of a representationalist (and, thus, legalistic) conception of legal interpretation.

1.1. Sameness, similarity and type

In par. 225 of the *Philosophical Investigations* we read:

"The use of the word 'rule' and the use of the word 'same' are interwoven. (As are the use of 'proposition' and the use of 'true')."

Indeed, it is a maxim of practical rationality (rather than 'formal' justice), to do the same thing in (essentially) similar cases. But how do we get hold of this sameness and similarity, given that cases are never identical? To solve this question, Larenz has proposed a theory of types in his *Methodenlehre der Rechtswissenschaft*, referring in the early editions to Hegel, in later editions also to Gadamer's hermeneutic philosophy, although with certain restrictions.¹¹

¹⁰ Baker/Hacker (1984, p. 442).

¹¹ The 1st ed. (1960) and the 2nd ed. (1969) are considerably modified by the 3rd one (1975). The 4th ed. (1979) is the one I quote from. It contains an interesting post-scriptum.

These restrictions are interesting, because they are indicative of the fact that Larenz only accepts the view on interpretation in *Wahrheit und Methode* if it is stripped of its anti-representationalist sting. Gadamer's view on interpretation is quite close to Wittgenstein's;¹² curiously enough it has the application of a legal rule as its paradigm. Gadamer infers from an analysis of this paradigm that the interpretation of a rule always means 'creating the rule anew, making it a new rule'. Rules do not stay the same under interpretation or application. So they do not 'guide' us in the sense of representing a picture with projective lines which our minds can lengthen until they 'hit' the facts of the case at hand. Larenz concludes that Gadamer has jettisoned the concept of sameness, the concept of a rule, and even the concept of justice.

Eine Maßstab verlangt, daß er auf alle an ihm zu messende Fälle in gleicher Weise angewandt werden. Das scheint nicht möglich zu sein, wenn sein Inhalt, was Gadamer ausdrücklich auch für die juristische Auslegung in Anspruch nimmt, 'in jeder konkreten Situation' - d.h. für jeden einzelnen Fall - neu und anders verstanden werden muß. Zwar ist es richtig, daß kein Fall einem anderen in jeder Hinsicht gleicht. Soll dennoch der 'gleiche' Maßstab angelegt werden, so darf jedenfalls nicht jede Veränderung der Fallkonstellation auch schon eine neue und andere Auslegung der Maßstab nach sich ziehen. Dann wäre der Gedanke des 'gleichen Maßes', ein Grundelement der Gerechtigkeit, reine Illusion.¹³

If it were really true, Larenz says, that the normative content of a rule becomes a different one in every case of its application, then it would be impossible to treat equal cases equally. He believes that, in consequence, his own theory of types remains a necessary element in a reflection on legal method, however he sympathizes with Gadamer's view.

Frankly spoken, I doubt if Larenz sympathizes with Gadamer at all. I would rather be inclined to hold that Larenz's notion of 'type' is all but hermeneutic.¹⁴ According to Larenz, a 'type' is a half-way house between, on the one hand, what is individual, empirical and concrete, and, on the

12 As Gadamer confessed to me in personal conversation on April 9th, 1984, he was very much in sympathy with Wittgenstein's views on interpretation.

13 Larenz (1979, p. 191).

14 I defended this thesis at a small conference on law and hermeneutics (Tilburg, December, 1982), but I was happy to find even better arguments in Frommel (1981), which I read afterwards.

other, the abstract concept.¹⁵ It is more concrete than a 'concept', as he declares with reverent reference to Hegel. But the reference is tricky, notwithstanding the reverence. Indeed, Hegel distinguishes between an *abstract concept* and a *philosophical concept* of factual reality¹⁶. The first restricts itself to the construction, from a necessarily limited number of particular phenomena, of a scheme or list of *common features*. This is an *abstract* concept, because it neglects altogether the questions it is most urgent to answer: Why is it that we see these features as *belonging* together, when it is always possible to refer to exceptions where some features are missing? And why is it that we see them as belonging to a certain space and time in history, without which 'features' could not even be formulated? And from what point of view could it be said that such a set of features *develops* in time and that such a development is, for instance, growth, or disintegration, or war, or entropy? These are the questions of philosophy. To answer them, philosophical concepts are assumed by Hegel to aim at the historical coherence of reality and even to be themselves part of this historical process in which coherence in reality comes to light.

This very brief and inadequate summary of the Hegelian notion of 'concept' may suffice to show that Larenz's notion of type is of quite a different breed. He suggests that we distinguish two 'phases' of type-building. In a first phase, we would select from concrete particular 'Gebilde' (forms) a set of features (general properties, relations, proportions). In a second phase, these selected features would be used "(...) in order to describe the type as a whole of features".¹⁷ But this 'whole of features' is far from being equivalent to Hegel's notion of a philosophical concept. Larenz calls it a 'phenomenal picture' (*Erscheinungsbild*);¹⁸ it is, thus, not the aim of philosophical understanding, but a carefully prefabricated *paradigm* of data which philosophy allegedly has to deal with. But this paradigm is a construct from abstract features. These features do not become more concrete in virtue of the fact that they are put together and baptized as a 'type'. For this is only a second step

15 A 'type' "...stehe gleichsam in der Mitte zwischen dem Individuellen Anschaulichen und Konkreten auf der einen und dem 'abstrakten Begriff' auf der anderen Seite; er sei Konkreter als der Begriff". (Larenz, 1979, p. 445).

16 *Enzyklopädie*, §§ 160-162; 163 (and *Zusätze*, especially the second one).

17 "(...) zum Zwecke der Beschreibung des Types als eines Merkmal-Ganzes". (1979, p. 445)

18 Larenz (1979, p. 448; cf. p. 500).

of abstract thinking about abstract thought. Such a hypostatized thought occupies the place that is, in Hegel's philosophy, reserved for full-blooded historical phenomena and their inherent partial reasonableness. In this specific sense, it functions as a *representation* of history. This representation is allowed to 'interpret', for instance, a rule of law, and it is not the case at hand that is allowed to do that, as Gadamer would have it. Larenz again:

In the plenitude of the particular features the 'nature of things' is mirrored. For they are nothing else than the specific, legal aspects of concrete, human relationships which realize themselves again and again in the life of the law.¹⁹

Let us note how this kind of representationalism urges Larenz to copy almost the whole of *possible* cases in terms of 'types' of cases: we need not just 'types', but also 'normal types' (p. 450 f), 'exceptional types' (p. 451), 'atypical configurations' (p. 451-452), 'transitional types' and 'mixed types' (p. 456). So, in the end, nothing is gained or ventured, but one thing: that nothing counts as 'following a rule', unless an act of mind has judged that is a feature of an, albeit exceptional (!), type. And as there can apparently be as many types as cases (at least virtually), this judgement is sheer decision.²⁰

It is, indeed, Wittgenstein who has pointed out that this is not interpreting a rule in any practical sense of the word. It is, at the most, substituting the rule by another one.

It is no act of insight, intuition, which makes us use the rule as we do at the particular point of the series. It would be less confusing to call it an act of decision, though this too is misleading, for nothing like an act of decision must take place, but possibly just an act of writing and speaking. And the mistake which we here and in a thousand similar cases are inclined to make is labelled by the word 'to make' as we have used it in the sentence 'It is no act of insight which makes us use the rule as we do', because there is an idea that 'something must make us' do what we do. And this again joins on to the confusion between cause and reason. *We need have no reason to follow the rule as we do.* The chain of reasons has an end.²¹

19 "In der Fülle der Einzelzüge spiegelt sich die 'Natur der Sache'. Denn sie sind nichts anderes als die besonderen rechtlichen Aspekte von in der Realität des Rechtslebens immer wieder verwirklichten konkreten zwischenmenschlichen Beziehungen." (Larenz, 1979, p. 456)

20 Krawietz (1984, p. 39) concerning Larenz: "Wer so argumentiert, kann nach Belieben eigentliche und uneigentliche Auslegung gegen einander ausspielen."

21 *The Blue and Brown Books*, p. 143 (Brown, II, 5). Let me emphasize that I do not quote this text to illustrate the thesis that all (legal) reasoning is in the end arbitrary. It is

What Wittgenstein does *not* mean here is, of course, that one might not have (good) reasons to follow a specific rule; he means, rather, that in case we decide, on the balance of reasons, to follow a specific rule, we are not guided by reasons which function as rules about following the rule we follow.

But now we are left with a serious difficulty: If the chain of reasons has an end, where does it find that end? I shall argue, in due time, that narratives are ways of ending a chain of reasons without hypostatizing the end. But let us first pay attention to a more candid and common answer: the chain of reason has an end in human agreement.

1.2. *Consensus as representation.*

It is tempting to read this candid answer from another well-known paragraph of the *Philosophical Investigations*:

The word 'agreement' and the word 'rule' are related to one another, they are cousins. If I teach anyone the use of the one word, he learns the use of the other with it.²²

One is inclined to believe that agreement or 'consensus' among individuals constitutes the rock-bottom one is looking for, when it is asked how a rule determines the steps that should be taken in order to follow that rule; or that it is, in the final analysis, a particular opinion agreed upon by many (or outstanding) people which determines what counts as 'doing the same as the rule says', or 'doing the same as in similar cases', or 'doing the same as in this type of case'. Such an opinion is presumed to be the place where the chain of reasons ends, where we give up justifying what we do, for instance, because we cannot avoid using this opinion in whatever we justify, even the opinion itself or even the opinion about justifying opinions.

Although Wittgenstein has warned his readers that this is the representational idea of 'agreement' which he wants to refute,²³ the idea is tempting indeed for certain theories of legal interpretation.

important to relate "an act of writing and speaking" to *Philos. Invest.* § 208 ff. and compare it to the function belonging to e.g. the expression '...and so on', or a gesture, or examples and practice, which are all narratively ("teaching"!) determined.

²² *Philos. Invest.*, § 224.

²³ Cf. *Philos. Invest.*, § 241, which is discussed in section 1.4.

This seems especially so for those theories that venture a form of non-cognitivism towards ontological natural-law principles or values. Granted that there are no such principles, one holds, it is nevertheless a fact that "Every individual and every society recognize certain normative principles as intuitively evident"²⁴ and that there is, in this sense, a "minimum content of natural law", to misuse Hart's famous phrase. These shared convictions would have the form of, for example, "Thou shalt not kill" or "No one should profit from his own wrong-doing", or "Quid pro quo", etc.

It is not so much the question whether these convictions are in fact 'shared', given the amount of violence and theft in the world, as it is the question if they are really convictions, beliefs or opinions. When it comes to *opinions*, very few people believe that "one should not kill", in this unconditioned form. Most people are of the opinion that there are exceptions. A few examples will illustrate this. If one should not kill, in any 'circumstances', one should perhaps kill no vegetables, micro-organisms, ants, wasps, rabbits, or chickens, or cows, or horses, or humans. Of course (as a matter of course²⁵) what is meant is, that people should not kill human beings. But is that a shared opinion in this unconditioned form? It is certainly not. That is precisely the reason why a rule of this kind is not a part of any system of criminal law with which I am familiar. Most people believe that there are *many* exceptions. For instance, one is allowed to kill humans if one is involved in a violent attack and is forced to defend oneself; or if one faces the duty to protect others, or to prevent someone from killing; or if there is a war and one is a soldier, or a guerilla; or if someone suffers excruciating pain when it is certain that he is going to die within two hours (days? weeks?); or if the fact that people get killed is to be considered as the result of an anonymous act, or a side-effect of it, or as the result of the functioning of an economic system, strategy, tactics; or if one kills oneself (though this was very severely punished in Ancient Europe); or in connection with the execution of a legal death sentence; or....etc. Does this lead to the conclusion that we do not agree that one should not kill? We obviously do agree, no doubt about that; but not as a matter of *opinion*.

There is agreement on some matters *in spite of* differences in opinion about them. Even more: agreement is valuable, because there is always this 'in spite of'. If we could except that, as to a certain question, there would not

24 MacCormick/Weinberger (1986, p. 122; cf. pp. 166-167).

25 Indeed, the expression is far from innocent. Cf. *Philos. Invest.* § 238, where Wittgenstein adds: "(Criteria for the fact that something is a 'matter of course' for me)".

be any sizable difference in opinions about it, consensus would not even be worthwhile. For instance, we do not strive for consensus where opinions in the sense of justifiable beliefs are silly, (e.g. concerning the quality of the weather) or factually unanimous (e.g. that the earth is round or that the principle not to kill does not imply that one should not eat vegetables). Agreeing on each other's opinion is a relatively rare and perhaps even boring form of agreeing with each other. We value consensus, because it enables us to live with differences of opinion and heterogeneity of views. It embodies the promise and evokes the hope that there is a way back when processes of justification, debates between opinions, tend to become hopelessly endless: a way to a common place where we are no longer expected to think, but to support a flag, to mutter a wise saw, to nod assent to 'the law'.

This is not to say that a flag, a saw, a law cannot be objects of consensus of opinions. They obviously can. This is the case when they are seen as representations of truths about the world. It seems relevant to refer, in this connection, to Ricœur's analysis of the notion of *ideology*. He points out that an ideology is, in the first instance, to be seen as the effort of a social group to stage (in the theatrical sense of the word) its identity, for instance, in a narrative about its origin or about its desires. Thus, it becomes possible for such a group to remember this identity collectively by commemoration of what, by definition, no one has witnessed.²⁶ But this remembrance is just a first incitement:

... for this domestication by remembrance may be the beginning of consensus, but it is also the beginning of convention and rationalization. It is for social praxis what a motive is for an individual plan: it justifies and prompts to action.²⁷

Ricœur reveals that this dynamic, generative potential of an ideology tends to take the form of a code, a grid, a framework of simplification and schematization, which enables the social group to envisage not only itself, but also history and, in the end, the whole world.

This code-character is immanent to the justifying function of an ideology. Its capacity to change things is only kept intact on the condition that the ideas

26 Ricœur (1977, p. 198 ff).

27 Ricœur (1977, p. 198): my translation.

which it submits are transformed into opinions and thinking loses some of its austerity in order to enforce its social efficacy.²⁸

Ricœur adds that although this third aspect of an ideology is a matter of opinion (*doxa*) and thus of maxims, slogans and proverbs, of likelihood and persuasion, it is no means in itself deceptive, or pathological. We should bear in mind that this is the price we pay for social efficacy. And I would like to add on my own account: we should bear this particularly in mind, when a legal theory appeals to an 'open' or 'topic' mode of legal reasoning which is perhaps supposed to burst the rigid concepts of legal doctrines ('dogmatics') or legal rules. To call upon 'topoi' is not in itself a refutation of legalism, because such a call may forget that it has paid the price of consensus. This oblivion we call representationalism.

It is very interesting to see how Esser's theory of legal interpretation tries to come to grips with this form of legalism. As is well known, his key term for criteria of rational legal decisions is *Konsensfähigkeit*, their 'consensual potential'.²⁹ This entails two things: the decision should, to a certain extent, arise from agreement, but it should also be able to generate agreement in society. This is only possible, according to Esser, when the argumentation for the decision gives ear to both the established and systematized conceptual apparatus of legal doctrine, and case-dependent, not (yet) integrated, evaluative points of view (topoi). These two aspects are in constant interplay. It is obvious that one should ask for evaluative viewpoints, not only on points which are at stake in a specific case, but also on those which are embodied in the more or less traditional concepts of doctrine. We are not able to understand the normative meaning of a traditional concept like 'real property', unless we are prepared to account for the present economic and socio-political meaning of (for instance) 'having a house'. But in the meantime, it is also obvious that we are not able to account for legally *relevant* viewpoints of evaluation unless we are guided by a tradition of judgements on what is legally relevant, a tradition that cannot but give itself the form of conceptual coherence: a systematized truth or theory about legal relevance.³⁰

Esser is convinced that legal doctrines become irrational if they forget that their concepts are, in the final analysis, sedimented evaluations of socio-po-

28 Ricœur (1977, p. 200): my translation.

29 Cf. Esser (1979, p. 10) and (1973a: pp. 9, 24, 84, 115).

30 Cf. Esser (1972b) and (1974). Esser avoids the simple binary scheme in which 'law is action' is expected to force open the 'law in the books'.

litical life. But he is also convinced that legal decisions become irrational if a courtroom turns into a stage for philosophical debates about the essence, or the possible existence, of the evaluations of socio-political life by the parties involved in a trial. The same argument that Dworkin brings up against positivism (to wit that it embraces an 'all or nothing' way of thinking to find itself forced into decisionism), is brought up by Esser against the suggestion that a lawsuit can be extended to a Socratic dialogue (the paradigm of philosophical discourse on final values): it leads up to 'all or nothing' world views, endless antagonisms, decisionism, and thus, alienation³¹. He points out that it is of the essence of legal institutions to establish reasonable ways to solve socio-political problems *provisionally*. And in order to arrive at provisional solutions, it is important that social actors not be allowed to first discuss a blueprint for an ideal society before they give up their conflict and embark on 'applying' what they agreed upon. That would be representationalism *par excellence*. Most problems of socio-political life are provisionally solved as one goes along: by the praxis of trying to solve them and not on a meta-level of discussion on what this praxis should be like. They ask for what Wittgenstein called 'an act of writing and speaking' which is not an act of reasoning on what counts as following a rule. It is perhaps comparable to the experience which every author has: some parts of a paper, for instance, are only discovered by actually writing the paper, and remain in the dark during endless pondering about what to write.

In this respect, then, Esser heads off representationalism by showing that doctrinal concepts are not just descriptions of the world 'out there'; they are, primarily, articulations of how we evaluate our acting in the world. He heads it off too by showing that consensus is not a matter of theory which can be put into praxis. But in another respect one may wonder whether Esser does not commit himself to the bias he tries to circumvent. Notwithstanding the theses which I have tried to summarize briefly, he also explicitly asserts that the concept of consensus itself has to be understood as a *Meinungskonsens*,³² a consensus of opinion, if not on the solution of a problem, then on what viewpoints, evidence, procedures, etc. bear on the effort to find a solution.

This is not just a verbal coincidence. Esser really locates consensus primarily at the level of categories, concepts and classifications, propositions and truths. When he speaks of 'griffige Konsensformeln' he means formulas

31 Cf. Esser (1974, p. 536) and (1979, pp. 18-19).

32 Esser (1979, p. 14).

which candidly express what people agree on as shared opinions; he does not, in any way, bring out that consensus itself already has the character of agreeing candidly on certain formulas as formulas, not as propositions; as symbols, not as truths.³³ He seems not to take into account that forming and exchanging opinions about how to act in the world presupposes a *currency* (a counterpart of money or the standard of money: *precious* metal, or *beautiful* shells) for what is to count as 'the world', and *to what extent*. This symbolic dimension, when something is named 'the world' without a guarantee that there is already something which we can designate as the bearer of this name apart from the name, is rarely accounted for in legal theory.

Within a few pages, I shall try to show that a narrative understanding of law may enable us to see the presence of this dimension.

1.3. 'Form of life' as representation.

The idea of consensus as representation of a shared opinion necessarily prompts a careful reading of *Philosophical Investigations*, par. 241, where Wittgenstein answers an imagined objection from the representationalist:

'So you are saying that human agreement decides what is true and false?' - It is what human beings *say* that is true and false, and they agree in the language they use. That is not agreement in opinion but in form of life.

Wittgenstein locates consensus in a realm that is already *presupposed* by the propositional structures of *doxa*, a realm which he designates by the words 'form of life', or sometimes 'attitude' or 'picture of the world'.³⁴

It is not difficult to see how this kind of term can be misunderstood along the lines of representationalism, thus giving way, in the context of law, to yet another guise of legalism. If we assume that a form of life is a pre-legal, but nevertheless institutional praxis of a certain social group, we do precisely that. Kripke's challenging exegesis of Wittgenstein circles around the very misunderstanding that following a rule is tantamount to 'being judged

33 Esser, of course, knows perfectly well that propositions about norms in legal doctrine have a peculiar status, because the value 'truth' has a peculiar semantic ring here: "(...) daß es sich als kognitiv erfaßbar ausgibt und doch die argumentativ erhärtenden Aufstellung von brauchbaren, d.h. akzeptablen Wertungsgesichtspunkten erlangt". (1979, p. 7). But the point is that this 'Aufstellung' of evaluative viewpoints or "Gerechtigkeitsentscheidungen" (1974, p. 537) already requires a sign adhered to by a community.

34 The phrase 'form of life' is to be found at only five places in *Philos. Invest.*: §§ 19, 23, 241, p. 174, p. 226, and two in *On Certainty* (358 and 359).

by a community to have proved (in enough cases) to respond to a situation in the same way as most of its members do'.³⁵

Baker and Hacker (1984) are pertinent in their argument that this view is precisely the opposite of what Wittgenstein had in mind:

For Wittgenstein, agreement is a framework condition for the existence of language-games, but it is not constitutive of any game It is not surprising that if one tries to go beyond rule-following into the framework that makes it possible, one will, in the process, lose the very concept of normativity one is trying to clarify; and with it too the distinction between correct and incorrect.³⁶

Nevertheless, they also hold that:

It is *acting* to a rule, a *practice* of normative behaviour that lies at the bot-tom of our language-games ... It is no coincidence that Wittgenstein often quoted the line from Goethe: Im Anfang war die Tat.³⁷

It is important to note, however that, according to Baker and Hacker, Wittgenstein does not invite us to a conception of 'form of life' which boils down to 'informal institutions'. e.g. patriotism, paternal love, respect for professors, bargaining on the market, etc, nor to 'the customs of every-day life'.³⁸ 'Following a rule' does not mean being guided by a picture of theses institutions or customs rather than by the rule itself.

In recent publications, Professor Aarnio has submitted a view on legal science and interpretation which departs explicitly from reference to the Wittgensteinian concept of 'form of life'. His clarifications of the concept seem to match neatly with Baker and Hacker's referring to *On Certainty*, par. 204, he says:

The form of life is a matter of action, it is a matter of acts (cf. with 402 (of OC; BvR). We shape our form of life with our action, and in our action ultimately are shown the things we trust (7 and 358 (sc. of OC; BvR)).³⁹

35 Kripke (1982, pp. 286-289).

36 Baker/Hacker (1984, p. 438).

37 Baker/Hacker (1984, p. 444).

38 Aarnio (1981, p. 48): "The basis of consensus lies in our *forms of life*, and therefore consensus is brought about in life practice."

39 Aarnio (1979, p. 34).

According to Aarnio, languages-games are built on this 'praxis', which consists of diverse, fuzzy-edged, 'sub-praxeis'. Participating in a form of life is a precondition for being able to take part in any of the language-games that *manifest* a specific form of life. There is no *rational* transition from one form of life to another; one may only be *persuaded* to change one's form of life.

I am, however, not quite sure if, on second thoughts, Aarnio shares Wittgenstein's part when it comes to avoiding the pitfalls of representation-alism. I list some evidence for my doubt:

1) Aarnio regards the form of life as a "multi-layered phenomenon".⁴⁰ But one may ask if not the relationship between 'phenomenon' and 'noumenon' is not, rather, part of our form of life.

2) Aarnio appears to conceive of a form of life as "in a way" an object of interpretation,⁴¹ where Wittgenstein maintains that it is

"(...) so anchored that I cannot touch it."⁴²

Or, at another place:

"(...) as it were, a dream of our language."⁴³

Therefore, it is, by definition, not an object of interpretation, but the 'grammar' of interpretation itself. The metaphor of a dream is forceful here. Although we speak of 'interpreting' dreams, what we really do is interpret narratives with a specific accidental: 'dream'. The *concept* of 'dream' itself, however, is tied up with unconscious labour (Freud) on certain aspects of our lives, which is not accessible to conscious interpretation.

3) Aarnio holds that a form of life is not an object of *rational* interpretation, but of persuasive interpretation. The success of this persuasive effort is determined by the acceptability of proposed ways of acting for a certain audience or 'auditory':

"(...) the auditory is the 'human side' of the form of life".⁴⁴

40 Aarnio (1979, p. 34).

41 And the interpreters (the 'auditory') "(...) transmit into legal-dogmatic interpretations the foundations of the consensuses they have created". Aarnio (1979, p. 35).

42 *On Certainty*, § 103.

43 *Philos. Invest.* § 358. I personally think that Max Black is right when he argues that the concepts 'form of life' and 'grammar' intermingle in Wittgenstein's later works (after *Philos. Invest.*). See Black (1980, p. 329).

44 Aarnio (1979, p. 35).

But here again, we should ask if Wittgenstein did not also block this road to representation of 'the human character' of our actions. In *On Certainty* § 475 (and a few other places as well) he qualifies the form of life as something *animal*, something which has, thus, by definition no human side. Or better perhaps: *something which is not human in virtue of the authority of humans to call it human*. Here Von Wright's remark is pertinent, that Wittgenstein did not have in mind 'full-fledged action', but 'pre-praxis', which precedes intentional action.⁴⁵ It is therefore perfectly all right to say that a change in forms of life is not a matter of rational interpretation, but rather of rhetorical persuasion in action.

But what is to count as 'human' does not *precede* - least of all in the form of philosophical prolegomena - the praxis of 'counting something as human'. So I am inclined to believe, that - unless I misread Aarnio - his appeal to Wittgenstein does not imply a commitment to Wittgenstein's concern to refute representationalism. To that extent, Aarnio's highly sophisticated account of legal thinking remains indebted to legalism.

1.4. Summary and prospect

This section has been chasing what was called representationalism in legal theory. I have tried to show that this almost innate mode of 'thinking' in our culture materializes particularly in the different nodal points which together determine 'following a rule'. If my argument is sound, it implies that each of these points - 'rule', 'similar type of case', 'consensus', 'praxis' or 'form of life' - can express a legalistic view on legal thinking. For legalism is nothing other than representationalism in the context of the law. It holds that there is some picture of facts (about the world, about our cognitive attitude, about social conventions of assertability), with reference to which we can make out whether some action is or is not in accord with the rule; and that the mind (of the legislator, the judge, or the citizen) is the agent who projects the features of this picture on the action he has to regulate or evaluate. In this respect, legalism is a variant of the general idea of representationalism I sketched at the beginning of section 1.

Now it is intuitively clear that we *are* able to tell if some action accords with a legal rule. Wittgenstein (but also Gadamer, and very recently even Derrida) has made this ability the paradigm case to argue against representationalism. His claim could be rephrased, therefore, as: the practice of law, as

45 Von Wright (1982, p. 179).

far as it is a practice of rule-following and rule-endorsing, is not adequately understood by representationalism, or, for that matter, legalistic theories of law. But then, of course, the question arises: How should it be understood? To answer this question, the notion of narrativity could play a central role, although this notion too runs the risk of being incorporated in the representationalist framework.

2. THE INCOHERENCE OF NARRATIVES

The notion of narrativity has been used in contemporary legal theory in several ways. Very bluntly one may distinguish between two (sets of) views: those that welcome 'narrative' as a predicate for a form of rational coherence of fact, and those that see it as a predicate for the facts that install rational coherence.⁴⁶ The latter group uses the notion of narrativity to emphasize that there is discontinuity between the conceptual discourse of law and its implicit epistemological presuppositions. The former group emphasizes, by the same expression, the continuity between these two elements.

Let me give a thumbnail sketch of different positions within the first group. Professor MacCormick maintains⁴⁷ that narrative coherence refers to a test of truth or probability in questions of fact and evidence upon which direct proof by immediate observation is not available. It provides a set of criteria, derived from the tentative and provisional explanatory schemes with which we make our world an intelligible one. This set allows reasonable inferences to be drawn from statements of evidentiary facts to propositions about unperceived events, so that it justifies our decisions about what contents of belief will constitute the case to be judged. Professor Dworkin, on the other hand, introduces 'narrative coherence' to account for the act of legal judgement itself.⁴⁸ He claims that, in each and every legal judgement, the whole of the law - including its political embedment and its history - is at stake as an integral unity. This integrity of law implies by no means an arbitrary juxtaposition or fusion of moral, political and doctrinal assertions. It is, rather, a communal, historical, partly institutionalized, partly systematized story of how a society wants to relate these moral, political, etc. ac-

46 See MacCormick (1984) and Dworkin (1986) for the former, Brockman and 't Hart (see note 3) for the latter view.

47 MacCormick (1984, p. 245 ff)

48 Cf. his (1986, pp 225, 227-228)

counts to each other in order to co-ordinate social and individual efforts. As such, it is a source of arguments for lawyers to make a legal decision the best it can be, though they may reasonably disagree at a certain moment of time what the best decision is.

These positions are different to a certain extent: MacCormick's interest is to account for the unity of the facts which constitute a case. Dworkin takes an interest in what accounts for the unity of the law governing a case. Both emphases are attractive, but only against the background of further understanding of narrative structure, as an account of the *relationship* between the coherence of the facts and the coherence of the legal norm(s). To put it another way: I would like to demonstrate that one can make an adequate distinction between factual coherence and normative coherence only if one accepts the narrative character of the framework which allows us to relate them.

Narratives have, under the pressure of literary theory, shown the curious habit of revoking whatever distinctive order or hierarchy we endorse between cause and effect, sign and meaning, fact and norm, the law of the facts and the facts of the law involved in a certain story. That is what interests the second group I have referred to: the one whose members stress that the law's account of either the unity of the facts or the unity of its own normative signification through time disguises a fundamental incoherence. Let us, in order to clarify this understanding of narratives, turn to some developments in narratology.

2.1. *Story and discourse.*

'Narratology' came into being when Walter Benjamin noted, in his famous essay *Der Erzähler*, that the storyteller and the story had been waning for some ages. It arose, not to play the part of the zoo rescuing the last copies of a species, but because it saw stories everywhere: in myths, fairy tales, music, stained-glass windows, film, dance, etc., but certainly also in the works of both literary fiction and science. It seemed that there had to be something common to all those stories, something which could be framed as an object of study, as they seemed to obey a certain code for stories whatever way they were materialized, whatever they meant to say and whatever interpretive approaches they mobilized. This common code was called 'structure' and the aim of the study was to explicate the 'logic' or the 'grammar' of this structure. One tried to establish elementary components of stories or of a particular kind of story, such as fairy tales), to style them into variables and parameters, and to make hypotheses about the algorithms that might govern the possible relations between these variables. It appeared that it was possible to formulate powerful generalizations about this grammatical structure of

stories. These generalizations were data for philosophical questions (Barthes) and paradigms for theoretical analyses on whatever could be regarded as an analogous realm of culture, including law (Greimas). In the meantime, it became clear to most of these theorists that it was *very* difficult to maintain a workable distinction between form and content. This was not *just* because demarcation in science is always a tricky enterprise, but *mainly* because the generalizations themselves tended to absorb and explain content-aspects. For instance, from specific relations between the variables 'destinateur' and 'destinataire' in law, hypotheses were inferred about 'the point' of the institution 'law', conceived as being itself a narrative.

At this very point of 'point', the 'logical' tradition of narratology met with a different approach to texts in general and stories in particular. Just a different approach? No, rather the arch-enemy of logic: rhetoric. Rhetorical analysis of stories (in terms of 'point of view', for instance) has been practised in literary contemplations from of old, but this approach gained attractiveness since it appeared that the sophisticated apparatus of 'structural' semantics/semiotics/semiology came down - when all was said and done - to an enriched restatement of the old problem: What is it, for a story, to have a point? Although this question would never be the same again after structuralism, it was still the question which E.M. Forster's well-known example addressed: "the king died, then the queen died" is not a narrative, although "the king died, then the queen died of grief" is.

A little pause to look at this example may suffice to see what is at stake here. Forster's tiny narrative connects two ways of telling 'what happened': it announces a series of events in temporal priority and *then* adds a qualification "of grief" which makes this priority significant. It is by no means accidental that events come first and the qualification second. Although in full-fledged stories the order may be less perspicuous, the simple paradigm case cannot help but reveal that it is based on an insurmountable presupposition of narratives: that the narrative is itself the presentation, articulation, modification, interpretation, evaluation or whatever, of something (the events) which is conceived of, by the story itself, as independent of and prior to the articulation, modification, etc. This rock-bottom distinction is mostly called the distinction, indeed the hierarchy, between *Discourse* and *Story*⁴⁹ or *Meaning* and *Event*. Even when we characterize a discourse as fiction, we only understand it by using this very hierarchical framework: the narrative

49 In the remainder of section 2.1 I summarize the main part of my paper 'Narrative coherence in legal contexts', to be published in the second volume of the Proceedings of the Conference on *Reason in Law*. (Bologna, 1984), by Carla Faralli and Enrico Pattaro.

can only be narrated (and received) in virtue of the presupposition that there is something 'outside' the story to tell something *about*; though in that case we do it 'with a wink' to what we trust to be a *real* distinction between Story and Discourse.

Jonathan Culler has argued,⁵⁰ however, that it is of the essence of narrative to prompt its hearers to a second presupposition, which is as necessary as the first one. This second presupposition too entails a hierarchy between Story and Discourse. But it is the exact inversion of the one in the previous paragraph. According to this presupposition, the narrative can only be understood if one acknowledges that the 'events' referred to are *not* independent of and prior to the Discourse, but are rather the products of discursive forces, restrictions and requirements. To support this thesis, Culler cites Greek drama, modern novels, Freud's report on the famous Wolfman case, Nietzsche's analysis of causation, and William Labov's research on 'natural narratives' in everyday life. His locus *classicus* is the play *Oedipus Rex*. The action of this drama is, without doubt, based on the gradual revelation (Discourse) of the meaning of a past event (Story). The event of 'Oedipus killing an old man at the crossroads' gets the meaning of 'Oedipus being guilty of killing his own father'. In this respect, the normative judgement of guilt is the consequent of the antecedent judgement of fact. This is the first presupposition. We may frame it as a hierarchy of reading: E---> I (Event prior to Interpretation). But the opposite presupposition is also present. A careful reading of the text makes it clear that Oedipus's guilt is never established by the crucial evidence which the old shepherd is expected to give as a former eyewitness at the crossroads. Although this witness is found at last, and although it is said before in the play by Oedipus himself that his testimony will be all-important, he is never asked to tell what happened at the crossroads. In fact, what makes this play a tragedy is that this final proof is omitted. The hero knows his destiny already and himself erases the possibility of innocence. He knows the prophecies, he knows the curse on Thebes, he understands from the shepherd that he is Laius's son, and he has not forgotten that he once killed an old man at the crossroads and reported that event in public. From all these narrative lines of signification one crucial *event* arises, which needs no further testimony as it is the keystone of the topology of the text: Oedipus acknowledges that he then and there killed his father.

50 Culler (1981, p. 172 ff). But note also (in Dutch) Verhoeven (1966).

Oedipus becomes the murderer of his father not by a violent act that is brought to light, but by bowing to the demands of *narrative coherence* and deeming the act to have taken place.⁵¹

It is precisely this bowing as a personal act which distinguishes the hero in the classical drama from the main character in an arbitrary blood-and-thunder-play. This recognition of his own identity requires revelation of an origin as a first cause. An origin which is, paradoxically, the effect of its effect, the present cause of past effects. This reading can be framed in a second hierarchy as: I --> E. (interpretation prior to Event).

It should be stressed, as Culler does in fact, that this second reading of the text is not *better* than the first one. It does not *replace* a naive, deluded, or somehow incorrect reading. Both hierarchies between Story and Discourse, Event and Interpretation are essential to the understanding of the text in its interesting aspects. What is more, we cannot invoke a higher-order hierarchy to harmonize the two opposite ones. For the categories of Story and Discourse are absolutely basic for the readability of the text. So each of the hierarchies:

(...) works by the exclusion of the other; each depends on a hierarchical relation between story and discourse which the other inverts.⁵²

If Culler is right, as I believe he is, we may even try to go one step further. From Culler's account it follows that 'narrative coherence' generates events in some sense of the word, and in another sense is the discursive upshot of those events. What has to be conceived of as an event prior to all interpretation turns out to be also the interpreting notion par excellence. This, now, is an important *performative* aspect of narrative texts. By mobilizing the two presuppositions mentioned above, the text succeeds in creating its own 'situation', at least in the sense of a cognitive attitude with which it should be told, heard or read. It is like the impulse coming from a statue or a painting that can make you stand in a certain place rather than another in order to make you look at it properly, while, at the same time, it denies that it is the causal source of your taking up that position. We may perhaps say that each story has its point, but that all stories have, as narratively coherent stories, a point in common: they can only 'make' their points if and when they are told, heard or read from this double-bind attitude. The attitude which narra-

⁵¹ Culler (1981, p. 174); my italics.

⁵² Culler (1981, p. 175).

tives encourage us to adopt is something like: "Do not act as if you must decide 'either event or meaning'". But we are bound to constantly make this decision, otherwise we would not be able to act (in the world) or to think (about the world). So the only possible way to obey the command is a sort of eternal 'reversing the charges': if you feel forced to attach meanings to events, try to find out which of these meanings generate events: and if you find yourself confronted with generating events from meanings, try to appeal to what is prior to all signification.

To narrate is, essentially, to make up for what is left out in conceptual (scientific or philosophical) thinking, to wit: the *singularity* of whatever singular event one is trying to give an account of. Conceptual discourse can propose *that, how and why* something happened, but only at the cost of leaving something out: the irreducible singularity of this specific something. Narratives are justified by being about something non-discursive, something "eventual", since *that* is a powerful way of presenting this something in its singularity. But that is still too simple a way of putting it. When it is true that narratives are not just constituted, but *justified* by being about something non-discursive, when they take an interest in being about some non-discursive event as much as they can, they have to avoid one particular danger of their own rhetorical strategy: they should avoid the pretension to be a totally adequate *re-presentation* of the event in question as singular event. For if they were to *claim* to have the power which conceptual discourse does not have (to have found a key to the inaccessible eventuality of things), they would at the same time destroy the basis of their justification. For in that case they would not only claim that eventuality is accessible after all, but also that they can (if only they would) give a (necessarily non-narrative!) account of what counts as adequate accessibility. They would turn into (no doubt *bad*) conceptual discourse. Narratives have an elegant way of coping with this danger: they trace a sort of self-denunciatory circle around an event. They intercept their own referring devices to the outward world by referring to this world as the focus of their own coherence.

It will perhaps be said that this is a primitive dualism. A dualism it is in a certain sense, but I am not sure whether it is primitive. What I have tried to say is this. The phenomenon of *narrative* coherence prompts us to assume an attitude of recognizing *ontological* incoherence, or the radical dualism between Story and Discourse. The presumption of ontological incoherence prohibits human thinking to claim truth on an ontological *Letztbegründung*, because this would, necessarily, be a piece of hypostatizing either *that* we think or *what* we think. On the other hand, the presumption of ontological incoherence entails neither a dualistic 'reality' (metaphysical dualism) 'nor a dualistic conception of knowledge (epistemological dualism). On the con-

trary, precisely because we give up hypostatized rock-bottoms, thinking and knowledge become a matter of *making* coherence, without there being an *a priori* guarantee or *rule* (which is always a rule in someone's, some class's, some time's *hand*) to decide what counts as coherence. So, in the end, *narrative* coherence evokes *epistemological* coherence via recognition of ontological incoherence.⁵³

2.2. A narrative account of rules.

A reformulation of this last thesis may bring out what the second section of the paper has to do with the first one. That first section argued that some key concepts of legal thinking (rule, case, consensus, praxis) are not legalistic by themselves, but only in virtue of their embedment in a deep presupposition of Western thinking: 'representationalism', which each of these terms may express. Representationalism holds that there is an *a priori* rule or picture or intuition or praxis that guarantees the correspondence of meanings with 'states of affairs' which are "indestructible".⁵⁴ Narrative coherence is a source for strategies to block representationalism in law, because it makes it possible to account for the radically *discursive* character of the states of affairs which legalism conceives of as 'the nature of things', or for that matter, 'social life itself'.

A rule (but a decision, too) is always some sort of concatenation of facts and norms. It is, characteristically, of the form "If A is the case, then one ought to do B". This form neatly brings out a similar double-bind hierarchy to the one discovered in the previous subsection. The facts are supposed to be, on the one hand, prior to and independent of the norm; for the norm indicates what should be done *in virtue of* something being the case, though it does not logically *follow* from anything being the case. On the other hand, these very facts are the focuses of narrative coherence in norms. They are, to quote Strawson's felicitous definition, "what statements, when true, state; they are not what statements are about".⁵⁵

53 Sec, for a narrative approach to the metaphysical concept of *substance* in law, my "Justice, Rights and Human Dignity. Some aspects of coherence in the legal concept of a person", to be published in the *Windsor Yearbook of Access to Justice*, vol. VII, 1987 (in print).

54 Wittgenstein, *Philos. Invest.*, § 55.

55 Strawson (1964, p. 38). Cf. Baker/Hacker (1984, p. 427 f) concerning Wittgenstein's view on facts: "(...) *no* facts are *in* the world (...). The picture of facts-in-the-world is a muddle. Its solution does not consist in denying that there are any facts concerning my

This definition allows us to point to the place where normative elements sneak into an account of facts: it is the place of the truth-conditions we develop in order to frame a picture of the world in which we can act. If we want to engage in action, we do not embark on scientific investigation,⁵⁶ which would lead us to endless chains of causality. We rather tell ourselves or our fellow-man what the world looks like, taking certain limits for granted. These limits are *set*, endorsed and enacted, as limits we do not *want* to exceed (provisionally). In this sense they are a set of norms. The narrative elements which generate 'the event' in *Oedipus Rex* are precisely of this kind: the curse on Thebes, the prophecies of Tiresias, the public report of Oedipus's past, etc. They are all endorsed limits within which the practical question "What should be done to Laius's murderer?" finds its world of facts. Jocasta's tactics in the play are to a large extent devoted to escaping the endorsement of these normative elements. The enactment of such limits is not something apart from the statement of fact which we make. It is a part of a narratively enacted framework. What things really are, Wittgenstein says, is dependent on "(...) the fiction I surround it with" (nach der *Erdichtung* mit der ich es umgebe").⁵⁷

At this stage of the argument, we may begin to suspect that our Western concept of law is not *obviously* compatible with a narrative account of the relation between facts and norms. For although both lawyers and legal theorists are willing to admit that facts are always qualified by the norms which are to be applied, few of them will go as far as acknowledging that there is no "brute fact" whatsoever which triggers off this series of qualifications and which is believed to be independent of and prior to its normative upshot. Indeed, we qualify *something unqualified*, don't we? How could a legal decision be justified if the very fact which required this decision would also be the re-

meaning things by words, but in sorting out the muddle. (...) (Wittgenstein) does not deny that what makes the proposition *p* true is the fact that *p*. He does not repudiate the claim that the proposition determines in advance what will make it true (what fact must obtain to make it true). Rather he rejects the metaphysical picture that goes with these claims. For these are grammatical statements, not metaphysical profundities." Right; but what is a grammar, i.e. 'something' that accounts for 'the harmony between thought and reality' (*Philos. Gramm.*, VII, § 112)? Wittgenstein did *not* counterpose grammar and metaphysics.

56 And as far as we do engage in action *during* scientific investigation (for instance, in experimenting), we *normatively* limit the area in which we try to understand what we are doing and to judge the truth-value of it.

57 *Philos. Invest.*, p. 210.

sult of the decision? Can the law afford to show its narrative strategies and allow the event under judgement to be the product of their coherence? That would amount to giving up the basic presupposition of representationalism, since it would constantly turn the tables of what is representing what.

It is clear from section 1 that there is a persistent tendency in legal theory to suppress the second hierarchy in the relation between facts and norms. Legalism in its different guises embodied the thesis that norms can only deontically determine facts and acts on condition that the latter can be represented as 'events', ontologically independent of the former. The next section will show us whether the practice of law is any less persistent in this respect.

3. SQUATTERS AND THE NARRATIVE COHERENCE OF LAW

Legal practitioners have a nasty, but salutary, habit of asking 'So what?' on hearing theories with critical overtones. This 'So what?' does not lose its sting after it has been disguised as a too eager demand for prescriptions from philosophy. Indeed, philosophy is not a hospital, as Merleau-Ponty used to say. But that should not discredit our - perhaps wishful - thought that the law *is* a sort of hospital. The credentials of a legal theory should, therefore, take the form of efforts which show what *difference* the theory makes when it comes to recognizing problems as 'questions of law'. This does not entail that a philosophy of law should generate new or alternative legal answers to actual cases. It entails, rather, that philosophy *about* law should admit that it cannot do without philosophy *in* law. The reason is probably best described as a matter of self-interest: a philosophy which pretends to be the law of the law drives a knife into its own flesh when it criticizes law; and a philosophy that refuses to give an account of the difference it makes to recognize problems as 'questions of law' carries this very pretension with it.

Recognizing questions as questions of law is at the heart of the legal order with which we are familiar. Indeed, the task of constitutional courts and courts of cassation to guard the unity of the law is bound up with their ability to recognize and to settle questions of law authoritatively. As is explicit in the argumentations submitted by these courts, this ability is a two-sided coin: to recognize questions of law means to distinguish them from questions of fact. However intensively it is emphasized that these two kinds of questions are mutually dependent, at the end of the day this distinction should be made, if, for instance, cassation is to do the job promised by the legal institution. Because (i) this distinction primarily concerns the relationship between norms and facts, and because (ii) our approach of narrative coherence tries to criticize the representationalist guises of this relationship,

one might expect to find a suitable area to test the credentials of my thesis on the spot, where cassation tries to do its job. By a modest presentation of a non-famous, but significant, case in Dutch (criminal) law - a case which went all the way up to the Court of Cassation in The Hague after some remarkable occurrences on March 8th 1979 in my own town, Tilburg - I will try to clarify my philosophical argument.

3.1 The case - a plain story.

A Health Service Office owned several houses next to its premises in Stationsstraat, Tilburg. It asked permission from the City Council to demolish these houses in order to replace them by new buildings so that it could expand its office accommodation. Some people in that area of the town protested when they heard of the plans, as the houses, in their view, represented a value that exceeded the interest of the Health Service Office: scarce housing, and equally scarce architectural highlights. They intended to give their protest the form of an objection in a procedure of administrative law, but before they took any formal action, the City Council granted the permission to the Health Service Office, and the alderman in charge informed them that they could not do anything by legal means to affect the permission.

In the meantime - while it was unclear to the public whether any permission had been requested or granted - a group of six young people squatted in one of the empty houses. They had lived there for about one month when the Health Service Office got the permission to demolish this house. This was on February 21st 1979. The Office immediately decided to carry out the demolition without further delay. The manager of the Office had a bailiff serve a writ on the squatters (and their legal adviser) on March 5th, summoning them to leave the house before March 7th. The legal adviser informed the squatters that this writ was not legally valid. So the squatters decided to do nothing but stay where they were. Meanwhile, the manager went on to prepare demolition. He asked the police if it would be legal to start demolition when it was known that there were people inside; and if so, whether the police would be prepared to stand by in order to protect the demolishers, as he had reason to believe that the squatters would offer violent resistance. The police consulted with the Public Prosecutor and with the Mayor, who are both responsible for public order. As a result of this deliberation, the police promised the manager that there would be protection at the time of demolition.

The remainder of the whole story is simple. On the morning of March 8th, the demolishers and several police officers were gathered in the canteen of the Health Service Office. The demolishers got instructions to demolish

the house from outside, *and* to be careful as there were people in the house. This they did. They approached the house at the back and the dragline started its work by crashing through a door and part of a wall. The squatters phoned the police for protection against a disturbance of domestic peace. The answer was 'we know what you mean'. Then they started throwing bricks and wielding iron bars. They were arrested.

3.2. *The facts of the facts*

It is, in fact, significant that the case is not famous and that it has not even been published in the Dutch law reports. From a legal point of view it is obvious why it was not published: it is a 'clear' case, not a hard one. The defendants did not stand a chance, either before the District Court of Justice or before the Court of Appeal, or before the Court of Cassation (the *Hoge Raad* of the Netherlands).⁵⁸ On the six arguments their lawyers believed they could use to attack the previous decisions in Cassation, the *Hoge Raad* responded in the following vein: "This Court has not to rule on this problem, as it is a question of fact, not of law. What you have brought up is so intertwined with what happened on March 8th 1979 in Tilburg and with what has, thus, already been considered and determined by the lower courts, that it cannot be regarded as a question of whether any rule of Dutch law has been violated."

Now let us assume that the defendants' lawyers were well aware of what cassation is about. Though one may be inclined to say that they were stubborn, they were not stupid. What the *Hoge Raad* regarded as questions of fact were, to their minds, questions of law, and very fundamental questions at that. The crucial thing was that defending counsel and the *Hoge Raad* were bound to come to disagreements over what counted as a question of fact, as they both stuck to rival, though equally hypostatized, concepts of law as well as of fact.

What was the problem, or rather the web of problems, as the case intersects public, criminal and private law? Let me try to give a necessarily deficient, but sufficiently informative summary, tracing circles of increasing circumference around the charges.

When the case was before the District Court, the public prosecutor had charged six young persons with committing violence, together and publicly

⁵⁸ For the sake of the argument, which is one of legal theory and not of comparative law, I translate the Dutch hierarchy of deciding courts in a vocabulary that allows a general understanding of the case, without worrying too much about the equivalence of this hierarchy to or the adequacy of this vocabulary for those of other countries.

against police officers on March 8th 1979. The official police reports as well as the statements of some witnesses make it at least very likely that the six youngsters threw bricks and aimed blows with bars at policemen and others. The defendants did not deny this. They pleaded self-defence against a violent and illegal attack. They argued that 'the law' itself, more particularly the Public Prosecutor, and still more particularly the very person representing the Prosecution Service who was then and there putting them on trial, had provoked or elicited such an emergency situation that they had to defend themselves by physical action, some of which might have exceeded reasonable proportions and turned into non-intended violence. Therefore, they claimed, the Public Prosecutor should not be admitted in court, as the evidence he submitted had been acquired illegally by provocation. And even if the evidence were allowed to be used, it would only prove that the defendants had done something they should not be punished for. To understand this argument and this claim, we need to know more about the 'facts' that are the subjects of these rival descriptions. Note that we feel the inclination to express this need as the need to know 'what really happened'. It will appear to be very difficult to satisfy this need.

Don't we already know what 'really' happened from the plain story? There is much more to be said, as we do not yet know what the predicaments of either the Health Service Office, or the squatters, or the police were in the eyes of the law. According to Dutch law, squatting in a house which is not in use by the owner is not a criminal offence, though it is a tort. Art. 138 of the Penal Code says that it is an offence to enter, without legal permission, a house *in use* by someone else.⁵⁹ The *Hoge Raad* decided in 1971⁶⁰ that this law should be interpreted restrictively: when a house is only owned, but not actually used, it is not an offence to enter it and, thus, to squat in it. On the contrary, it would be an offence (disturbance of domestic peace) to enter such a house, as then actually used (by squatters). If the owner of the premises wants the squatters to move out of the house, his access to justice is via civil law. He has to sue the squatters in tort, so that the judge will order the squatters to leave the house. But to be able to sue them in a civil suit, the owner has to know their names. And a squatter's first lesson is to carefully hide his name from others. That is, by the way, the reason why the squatters in the case at hand did not bother to call upon legal remedies after they were summoned to vacate the house: they would have had to give their names.

59 Cf. art. 12 of the Constitution 1983.

60 IIR 2-2-1971, NJ 1971 no. 395.

Though legal authorities in the Netherlands are not altogether happy with this gap between criminal law and civil law, and have attempted to close it in order to prevent squatting, the situation in Tilburg on March 8th 1979 was quite clear. Notwithstanding the views of the police, the Public Prosecutor, the Mayor and the Health Service Office, the demolition of the premises, in actual use by the squatters, was illegal. It was (at least) to be treated as a disturbance of domestic peace. The officials knew that, of course. This is evident from the explicit instruction to the demolishers not to enter the house, but to demolish it from outside. The demolition contractor declared in court that there was no technical reason whatsoever for this, and that he had presumed a legal reason for it. Moreover, it was confirmed that the demolition was illegal in the verdict handed down by the District Court. The Court considered that, although the demolition was illegal, the means of defence chosen by the squatters were illicit too. Immediately after they received the writ, they had *legal* remedies at their disposal (to apply for immediate judgement on the summons, for instance). They had the obligation to choose these means, rather than chance a direct confrontation with the demolishers. Whatever the legal value of the writ would turn out to be, it should have been conceived of by the squatters as the adequate expression of a factual intention on the part of the owner. The proportionally justified reaction would have been to call upon the law. Once the squatters had deliberately chosen to stay, pleas of self-defence or excessive self-defence in (unexpected) emergency were in vain.

The Court of Appeal replaced this argument for the punishability of the actors by a stronger one. The writ, whatever its legal value, should have been an inducement for the squatters to defend themselves in a purely factual sense by leaving the premises in the first place, because it was clear that they could not establish any legal interest. The proportionally justified reaction would have been to show a clean pair of heels. This argumentation was upheld in Cassation.

3.3. *Law and narrative*

It has been necessary to explain at least some aspects of this case in order to link it with the tiny piece of narratology presented in section 2.1., the inverted hierarchies between Story (Event) and Discourse (Meaning). I now have to show how we may see these hierarchies and their inversion at work.

It is obvious that we cannot escape from reading the legal decision on this case in the following way: let

- (i) the legal qualifications of the facts as constituting offences,
- (ii) the evaluations of whether the actors should be punished or not,

(iii) the attributions of certain penalties, differ as much as they can; in the final analysis they present themselves as discursive unfoldings *of and from* an event, which is itself independent of discursive signification. We may refer to this event as 'the six youngsters throwing bricks and wielding bars'. Whatever the intentions, the context, the rules, etc. may be, THAT is what happened as far as the law is concerned. We may even go one step further: even the decision to offer police assistance on March 8th was a discursive, namely anticipatory, unfolding of this event. The only thing is that in this very first legal signification of "what would happen" it is necessary to supply a specific 'victim' of the stones and the bars: the demolishers. Police assistance was promised because it was expected that the squatters would behave violently *against the demolishers*. This will turn out to be important.

In order to corroborate the thesis of section 2.1., we will have to show that this violent behaviour *against the demolishers* should not be read *only* as the point from which the normative (legal) signification unfolds itself and sets itself on stage as 'pertinent to reality'; but that this violent behaviour is also, and at the same time, generated as a point which derives its reality value from the coherence of this normative signification. In other words: it *must* have been the case in retrospect that the squatters molested (or as the case may be, would molest) the demolishers. Otherwise the legal discourse in this case would lose its coherence and, indeed, its normative force. For remember, the police had legitimation for the promise of protection and the protection itself only if and in so far as the squatters exhibited violent behaviour *against the demolishers*. To put it another way: the police had an obligation to protect the corporal integrity of the demolishers as *individual human beings*, but they were also under the obligation *not* to protect what the demolishers were doing as *demolishers*. For the demolition was illegal. So the story has to be narrated in such a way that it is beyond discussion that corporal integrity was at stake, otherwise there would have been nothing to protect in the first place. Or rather, the police would have been obliged to protect the squatters against the demolishers. For since the demolition was illegal (as the police and the authorities knew it was), there would have been little difference between throwing bricks and throwing walls (by demolishing while there were people in the house) or between wielding bars and wielding a dragline. We may therefore conclude that the second hierarchy (I--> E) is as necessary to an understanding of what has been going on as was the first one, although it is not in any sense a better reading.

Against this background of the two necessary but incompatible hierarchies of reading, we may repeat our question of a few pages earlier: Can the law afford to acknowledge this paradox and use it to avoid hypostatization of

either norms or facts? We shall see that *both* the legal authorities *and* defending counsel painfully attempted to base their argumentation on the exclusion of either one of the hierarchies. The authorities built their argument on the hierarchy E--> I. Defending counsel exploited the opposite hierarchy, I--> E.

The files of the case offer the following evidence for this thesis.

a) E--> I. I have said that in order to justify legal action against the squatters, the *datum* of (anticipated) violence from their side *against the demolishers* was essential. But however essential this datum may be as an irrefutable event, it could hardly be proven in court. For the police had used undercover agents: some of them were disguised as demolishers. So the testimony of eye-witnesses would face the problem of who was who. The trial was arranged in such a way that this problem could never arise. The first and most important arrangement was that on a careful reading of the charges - violence against the demolishers *was not charged*, though violence against police officers was. The other arrangements sustain this first strategy and minimize the part played by the responsible authorities in preparing the demolition. Thus we may list:

- (i) The Public Prosecutor who gave the permission to protect the demolishers, and appeared in court himself to charge the squatters, in this way avoiding being called upon as a witness;
- (ii) It remains unclear what the structure and the outcome were of the so-called 'tripartite' consultation between the mayor, the police captain and the Director of Public Prosecutions;
- (iii) It remains unclear who gave instructions to the demolishers.

b) I--> E. Defending counsel were very well aware of the possibility of an alternative reading, but they could not afford to refrain from hypostatizing it either. They did so by framing their intuition in the terms of received doctrine. They 'felt' that the event which constitutes the point of departure for the legal discourse is itself the product of narrative coherence in legal discourse. Their defence is based, from the District Court to the Court of Cassation, on the presumption that this narrative strategy of the law can be laid bare by accusing officials of illegal behaviour. They plead 'provocation of an offence by the Public Prosecutor'. And already the Court of Justice had a short way with that. For the doctrinal structure of the concept of provocation is such that it would imply an intention on the part of the Public Prosecutor to make the squatters throw stones and wield bars. This is, of course, an impossible implication for the Court.

The squatters were sentenced to two weeks (suspended). I do not pretend to have a better solution. I do not even have any advice for a more effective strategy of argumentation, either for the courts or for the defending lawyers. In fact, the District Court did a great deal to show that it had at least some

sensitivity to the power of narrative forces, by indicating that the demolition was illegal and that the squatters should have searched only for legal ways out of their predicament. But as soon as the defendants alleged the inadmissibility of the Public Prosecutor in court, the Court of Appeal and the Court of Cassation had to take their part in covering up the facts of the case: the facts became unattainable.

4. RETROSPECT

Narrative analysis is capable of demonstrating how (a system of) legal norms could 'provoke' events as focuses of narrative coherence. This term 'provoke', however, should not be confused with the term 'provoke' in the sense of legal doctrine. The latter obviously obstructs legal decision-making (for instance because of unlawfully assembled evidence). The former dismantles a legalistic (representationalist) approach to legal decision-making, rule-following, etc. We saw the legal authorities deny that there was any provocation in either of the senses. We saw the defendants claim that there was provocation in both of the senses. Both are held captive by the representationalist view about the distinction between norm and facts.

So let us face the following question for discussion: Should we think about what a non-representationalist concept of law would be? Or should we think about how to avoid in society an appeal to what is unavoidably a representationalist framework of thinking and acting: law? Perhaps both ways could be viewed as epiphenomena of a narrative approach towards the coherence of law.

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A LINGUISTIC ANALYSIS OF NARRATIVE COHERENCE IN THE COURT-ROOM

MONICA G.W. DEN BOER

INTRODUCTION

Legal philosophers seem to be pursued by a new plague: the notion of narrative coherence as a foundation of legal reasoning. Reflection on this notion has caused a considerable amount of controversy among legal philosophers. This article aims to be a linguistic (discourse-analytical) contribution to the discussion. It will attempt to reflect on the notion of narrative coherence from a relatively external point of view - theoretically less loaded by philosophical constraints.

The first part of this article attempts to clarify the notion of narrative coherence on a top-down approach: How may we define narrative coherence and what are its potential meanings for the process of reasoning within the legal discourse? The second part will choose the bottom-up approach, to the extent that we will try to apply the notion of narrative coherence to an empirical case of Dutch Penal Law, after which we will derive some conclusions with respect to the function of narrative coherence (see chapter 6).

1. STORYTELLING DEMYSTIFIED

Many people regard the act of storytelling as something that is dying out. Nowadays, storytelling seems to be a privilege of gifted and talented authors of fiction. It also seems to be true that in modern cultures the 'art' of storytelling has been taken over by the more effective and anonymous written medium.

For a long time, storytelling has been perceived as a special performative capacity. "It is not easy to tell stories." Unlike the act of resorting or trans-

mitting information, storytelling does "not aim to convey the pure essence of the thing."¹

Apparently, storytelling is first of all culturally connotated with transcending mere reporting of the fact, and secondly, with the 'art' of telling fiction.²

Both connotations may be linked with a general conceptualization of the communicative function of narrative discourse. Storytelling should 'entertain' the receiver, while reporting should merely 'inform' the receiver. Storytelling is regarded as being evaluative, while reporting is regarded as being neutral.

The distinction between the narrative and the report is thus drawn on the basis of *functional* considerations. It is exactly for this reason that the distinction is wrong, certainly when we take a hermeneutic point of view. Every reproduction of a 'fact' – be it in the form of a narrative or that of a report – is preceded by the act of interpretation. Therefore, every interpretation of 'reality' is evaluative. 'Reality' cannot be completely objectified if we do not make use of a formalistic meta-language.

Another counterargument we would like to raise against the generally accepted distinction between storytelling and reporting, is that storytelling is a communicative phenomenon which exists in many forms and shapes,³ and that the narrative text as such is a basic communicative model by means of which we organize our perception of 'reality'. According to Bennett and Feldman, "stories are everyday communication devices that create interpreta-

1 Walter Benjamin, *Illuminations*, Fontana/Collins, London, 1973, p. 91. See also: Otto Ludwig, "Berichten und Erzählen", in Konrad Ehlich (Hrsg.), *Erzählen in der Schule*, Narr, Tübingen, 1984, pp. 38-66.

2 Hans Ulrich Gumbrecht, "Erzählen in der Literatur-Erzählen im Alltag", in Konrad Ehlich (Hrsg.), *Erzählen im Alltag*, Suhrkamp, Frankfurt a/Main, 1980, pp. 403-420.

3 We would like to draw a distinction between stories and canonic texts, like jokes, fairy tales, biblical texts or texts of law. For example, jokes are texts with a relatively fixed structure and content, so that they can only be marginally changed when they are retold. Canonic texts, more than everyday narratives, carry a relatively fixed moral and social function. "Storytelling is seen as a general semiotic skill that is not confined to a particular historical epoch, a particular situational or communicative context, or a particular medium. As a result, the objects of narrative analysis can be traditional or modern, literary or everyday conversational texts, written as well as oral texts, and, at least under the demands of an all-encompassing semiotic approach, even stories without language, such as those using visual symbols or pictures."; Elisabeth Gülich and Uta M. Quasthoff, "Narrative Analysis", in *Handbook of Discourse Analysis*, Vol. 2, Teun A. van Dijk (ed.), Academic Press LTD, London, 1985, pp. 169-198 (169).

tive contexts for social action". And: "In everyday social situations people use stories as a means of conveying selective interpretations of social behaviour to others."⁴

The discursive form of storytelling provides social actors with the opportunity to exchange experiences,⁵ or information. Storytelling offers a common pattern of transferring and storing knowledge,⁶ because the textual structure of a story is bound to certain criteria and is also communicatively transportable through discourse. Stories⁷ may be perceived as rhythms, or even as algorithms by means of which action and knowledge may be organized. The model of a story is open enough to allow new elements to be fitted in, even in different optional structures. As children, we are taught to structure our events in a logical and comprehensible way. We master not only linear strings of propositions ("and then...", "and then..."), but also hierarchical structures of thematic connection, in which the information being conveyed is simultaneously dressed up in a veil of evaluation.⁸

Within communicative situations, storytelling carries the function of transferring information *plus* a message. These messages vary in their character: they may, for example, be practical, moral, amusing or informing. In this respect, the narrative text may be defined as a speech act with illocutionary and perlocutionary force. In telling a story, the performer intends to attain a certain effect (or sometimes even more than one effect), such as warning, hurting, convincing, amusing ... or just informing. Even a story merely meant to inform the receiver about event X is a story that is permeated by evaluations. The event, or whatever the story tells about, is first in-

4 W. Lance Bennett and Martha S. Feldman, *Reconstructing Reality in the Courtroom*, Tavistock Publications, London, New York, 1981, p. 7.

5 Konrad Ehlich, "Der Alltag des Erzählens", in *Erzählen im Alltag*, Konrad Ehlich (ed.), Suhrkamp, Frankfurt a/Main, 1980, pp. 11-28 (20).

6 Konrad Ehlich, "Writing Ancillary to Telling", in *Journal of Pragmatics*, 1983, pp. 495-507.

7 Stories can only be defined arbitrarily. Often we use intuitive notions for reference to "(...) the set of linguistic products (discourse) of the conventional speech act of 'telling', 'narrating' performed both in normal everyday conversation and in specific (exclusive) contexts of narration.", Teun A. van Dijk, "Philosophy of Action and Theory of Narrative", in *Poetica* 5, 1976, pp. 287-338.

8 See William Labov, "The Transformation of Experience in Narrative Syntax", in *Language in the Inner City*, Basil Blackwell, Oxford, 1977 (1972), pp. 359-397.

interpreted by the informer. The event, as it is perceived, is first filtered in a previous stage.

Roland Barthes states: "The narratives of the world are numberless. Narrative is first and foremost a prodigious variety of genres, themselves distributed amongst different substances - as though any material were fit to receive man's stories."⁹ If storytelling is defined so generally, and as universal to such a high degree, what can the usefulness of the description provided be? The universality of this phenomenon clearly faces the researcher with what seems to be an utterly hopeless situation. But should the universality of storytelling mean that its analysis has to be entirely done without?

Our answer to that question would be a negative one. At least we should try to isolate the story as a text, and then take a look at its discursive function. We shall discover that even the utterly simplest stories are highly complex in their organization. In stories everything seems to coincide. How are we to keep a clear head?

2. DECONSTRUCTION OF NARRATIVE COHERENCE

Using a new tool requires careful investigation of its potentialities and implications. In order to come closer to the answer of how we are to use our new tool, let us take a moment to define its possible meanings.

Obviously, the term 'narrative coherence' is a combination of the concepts 'narrativity' and 'coherence'. What do these terms - taken separately - approximately mean?

The word *narrativity* reminds the Dutch speaker, though there is no etymological connection of the German and Dutch word *Narr/nar*, which we could translate in English by 'fool' or 'jester'. A *nar* was a person belonging to the chamber of rhetoric at a royal court. Those chambers of rhetoric were 15th-century associations which were organized as guilds with the aim of cultivating the art of poetry, theatre and rhetoric.¹⁰ Within the area of common law, *narratores* were the very first lay legal experts; they were the orators, rhetoricians or oral pleaders before the royal courts in the formative period of the common law.¹¹

⁹ In *Image Music Text*, Essays selected and translated by Stephen Heath, Fontana Paperbacks, London, 1982 (1977), p. 79.

¹⁰ *Historisches Wörterbuch der Philosophie*, p. 398.

¹¹ P. Goodrich., *Reading the Law*, Oxford, Blackwell, 1986, p. 170.

Given its literary origin, the word 'narrative' was mainly applied to accounts which were called fictive, like tales. Later on, the word 'narrative' was used in a broader way, to signify the exposition of facts too.¹²

A useful explanation of the adjective 'narrative' ('narrativ') is provided by the *Historisches Wörterbuch der Philosophie*,¹³ where the term stands for a *textual scheme* which is fundamental in all cultures for ordering our experiences and our knowledge: narrativity includes a descriptive scheme in which action and event are mutually related in a relevant and temporal-logical way. Narrations show their relative closeness and thematic identity within the surrounding discourse. The *Historisches Wörterbuch der Philosophie* goes on to state that the concepts of 'narrative' and 'narration' are distinct from concepts like 'telling' and 'tale', because the former are supposed to be descriptively neutral.¹⁴ Tales - fairly tales - are the canonic texts. We might again question this distinction on hermeneutic grounds. Is it not the case that every retelling requires an interpretation, and therefore implies a change? Or, to say it with Gadamer, interpretation is not reproduction of the text in its pristine state: "(...) not only does the text, at all times, represent more than the author intended, it is also read differently in different circumstances and understanding is, therefore, a productive endeavour."¹⁵

Hence, we may conclude that the current scientific meaning of the words 'narrative' and 'narration' is limited with respect to its meaning in ordinary language. The ordinary use of those terms also refers to the subjectivity and fictivity of the act of narrating.

What now with respect to the concept of 'coherence'?

At first glance, the term 'coherence' is hardly distinguishable from concepts like 'cohesion', 'consistence' and 'correspondence'. Coherence even turns out

¹² For example, the *Grande Dizionario della Lingua Italiana* defines 'narrativo' as an exposition of historical facts ('di fatti storici') and of real events ('di avvenimenti reali'), but also as the exposition of fantastic or imaginary events ('di eventi fantastici o imaginari').

¹³ p. 398.

¹⁴ p. 398.

¹⁵ Translation of Hans-Georg Gadamer, in Josef Bleicher, *Contemporary Hermeneutics. Hermeneutics as Method, Philosophy and Critique*, Routledge and Kegan Paul, London, 1980, p. 111.

to be a conceptual umbrella for two of these. Coherence is related to the act or fact of sticking together (cohesion), but also to logical connections (consistency, non-contradiction).¹⁶ And vice-versa. Coherence is explained as the act of cohering; consistence is explained as "a material coherence and permanence of form", or "a union or combination of cohering elements".¹⁷ An idea or story is consistent if it is free from internal incompatibilities or contradictions.¹⁸ In general, coherence is related to a state of harmony and the absence of contradiction between various elements of a set of ideas or facts.

On the other hand however, the term 'correspondence' has a divergent meaning, since it is explained as 'agreement, similarity or analogy'; in other words, object X must be consonant with object Y in order to be correspondent. The divergence of the term 'correspondence' may be traced back to two traditionally opposed theories of truth. Empiricism claims the Correspondence Theory of Truth and argues that a system may be internally coherent without stating anything about the truth at all.¹⁹ It is Rationalism on the other hand which claims the Coherence Theory of Truth and criticizes the method of correspondential truthfinding, because - as it is argued - correspondence may be "established".²⁰ Within the Coherence Model one emphasizes logical criteria, like internal and external consistency between system elements.

This short review of the potential meanings of coherence reveals that the state of coherence is only attainable given the fulfilment of the criteria of cohesion and consistency. Cohesion is a criterion which remains at the material basis of the text. The elements of the text must 'semantically stick together', which is linguistically accomplished by means of coreferential devices. These devices connect morphemes, lexical items and propositions to other referents.²¹

¹⁶ *Oxford English Dictionary*.

¹⁷ *Idem*.

¹⁸ Van Dale Groot Woordenboek der Nederlandse Taal.

¹⁹ *Dictionary of Philosophy and Religion*, p. 152.

²⁰ *Idem*, p. 152.

²¹ Coreferential devices are linguistic elements like anaphora (which refer backward, like 'the house' which is transformed into 'it'), cataphora (which refer forward, like 'he', which is transformed into 'John'), pronominalization (substitution of lexical elements by

Consistency on the other hand occupies the logical space within the text, that of non-contradiction. Within the text, all propositions have to follow the thematic structure of the text. The propositions have to be ordered in such a way that they represent logical consequences of previous propositions.²²

However, unlike the criterion of cohesion, the criterion of consistency transgresses the textual frontiers. The text should be not only internally logical, but also externally logical, which means that it has to be consistent with its context, its environmental discourse or system. A proposition within, say, a summons (a strongly reduced legal version of the original suspect's story) should not contradict the applicable article of law, because "(...) each sentence or clause is subject to contextual interpretation."²³ It remains without doubt that the accomplishment of coherence comes about not only at the level of the text, but also at the level of the communicative situation in which the text is produced and comprehended. This considers among other factors the mutual knowledge possessed by the communicative actors; to what extent are they able to provide meaning to a text and how far are they guided by their interests when they interpret the text?

Not just as playing word games, but in order to bring together the two concepts of 'narrativity' and 'coherence', it may be useful to oppose 'narrative coherence' to 'coherent narrative'.

When we talk about 'coherent narrative', we refer to a state of coherence accomplished within the narrative text itself - based on fulfilment of the two criteria of cohesion and consistency. The coherent narrative is a status quo or a passive result of a process. This process, the active part, is equal to what we call 'narrative coherence', which is the action of attaining coherence within the text by means of a narrative strategy. This narrative-discursive strategy consists of a combination of various transpositions;²⁴ the result of

personal pronouns), conjunction ('and', 'but', 'because', 'hence', etc.) and lexicalization (substitution of lexical items by other lexical items of the same order, like 'rose' into 'flower').

²² This is mainly valid for simple textual structures, in which the textual elements and propositions are chronologically ordered (no embeddings).

²³ Walter Kintsch and Teun A. van Dijk, "Toward a Model of Text Comprehension and Production", in *Psychological Review*, Vol. 85, No. 5, 1978, pp. 363-394, 389.

²⁴ See also: Evelyne Serverin and Sylvie Bruxelles, "Du judiciaire au juridique: un procès d'avortement dans les revues de jurisprudence", in *Langages* 13, 1979, pp. 51-85, 57.

it may be a shift from one discursive field to the other. The legal fact is a transposed, narrated fact. Within the narrated fact itself, "(E)vidence gains coherence through categorial connections to story elements, such as the time frames, the characters, the motives, the settings, and the means."²⁵ The fact is narrated according to applicable legal norms. To judge whether the result of narrative strategies is legally coherent, we need more than linguistic and logical criteria. What about criteria of a normative-legal character?

3. THE NARRATIVE TEXT WITHIN LEGAL PRACTICE ²⁶

If narrativity can be defined as a basic organizing principle of all human discourse, then narrativity is the underlying discursive model of legal discourse as well.²⁷ The legal discourse needs the model of the story to capture the fact, and it needs a narrative strategy to transpose the ordinary fact into the legal discourse.

Penal Law with its accompanying discourse is particularly based on the idea that there should be '*facts*'. Without facts there is no proof, no evidence, no legal process at all. Law describes its own reality. At this point the ideal positivistic idea comes in, which is that language depicts reality ('facts') as purely as possible.²⁸ It was Wittgenstein, in his *Tractatus*, who translated this positivistic idea as follows: "Sentences, since they are pictures, have the same form as the reality they depict."²⁹ A picture, and therefore also the proposition, is perceived as *the* fact. This idea was not, however, adopted by the Vienna Circle, because this doctrine stated that propositions report 'direct perception' and 'what is immediately given in experience.'³⁰ In the opinion

²⁵ W. Lance Bennett and Martha S. Feldman, *Reconstructing Reality in the Court-room*, Tavistock Publications, London/New York, 1981, p. 8.

²⁶ Our account of the 'legal narrative' is mainly related to (Dutch) Penal Law discourse.

²⁷ A.C. 't Hart, "Strafrecht: de macht van een verhaalstructuur", in A.C. 't Hart e.a., *Strafrecht en Beleid*, Acco, Leuven, 1983, pp. 413-471 (415).

²⁸ *Idem*, 417.

²⁹ *Op. cit.* in *The Encyclopedia of Philosophy*, Vol. 7/8, p. 330 (Norman Malcom, Wittgenstein, Ludwig Josef Johann).

³⁰ *Idem*, vol 5/6, Logical Positivism, pp. 52-57.

of the Vienna Circle, the verification of a proposition was inherent to its meaning. For the moment we will leave this discussion aside. Other more philosophical considerations with regard to general assumptions on legal factfinding will be dealt with in the next paragraph.

Narrativity is a hidden and also by many lawyers a neglected technique for the creation of causality of the legal fact. In order to make a 'fact' institutionally hearable, the perceived reality must be 'cut off' somewhere.³¹ As Broekman states: "Law never repeats reality *ab ovo*."³² Once the fact has been ascribed an origin, a story may be constructed in an apparently neutral way,³³ which means that it is rid of institutionally irrelevant factors.

Here, two functions of the legal narrative join each other. The first one is the creation of causality, the other the almost automatic transformation of a perceived reality, whereas applied relevancy-criteria remain invisible and cannot be relied upon at a later stage. A third function of the legal narrative is that a certain action becomes subjectified against the general legal-normative background of forbidden or allowed actions (i.e. the law); a legal story individualizes the action by pointing out the name of the suspect, the place and the time of the action.

The denial of the narrative basis of law is therefore a remarkable feature: law cannot even exist without narrated facts of reality. Law needs a social input of conflict; the bear must be fed. Whereas law may be regarded as the removal of this social tension, the theme of disturbed balance is always central within law. Law, which *is* a story, becomes a story of the restoration of social continuance.³⁴

Special attention has to be paid to the position of the storyteller in law. It is not the story of the actor himself which predominates, but the institutionalized story. As soon as the suspect tells his story to a police officer, this story becomes transformed and translated into a legal story - according to legal criteria. The original story becomes covered by a garment of legal evalua-

³¹ Frank Burton and Pat Carlen, *Official Discourse. On Discourse Analysis, Government Publications and the State*, Routledge and Kegan Paul, London, 1979, 109 f: "(....) a form of narrative history, that cuts off at particularly apposite moments. This asserts that the cut-off point represents the significant origin of the problem".

³² In Dutch: "Recht verhaalt werkelijkheid nooit *ab ovo*", Jan M. Broekman, *Recht en Antropologie* 2nd ed., Antwerpen, Standaard Wetenschappelijke Uitgeverij, 1982, p. 174.

³³ Frank Burton and Pat Carlen, *op. cit.* 1979, p. 112.

³⁴ t Hart 1983, p. 437.

tion, the legal folio. In the further development of this story - the development of the story into a legal file - an intertextual relation between the story and legal texts is created on the basis of a narrative technique. Somewhere during this process, the suspect has to capitulate to make way for the institutionalization of his story.³⁵ He has to hand over the ball and is forced to say: "O.K. Now the story is yours." The second narrator, the lawyer, possesses enormous capacity to reshape the original version of the story. The lawyer integrates his legal knowledge into the original story, so that it becomes 'subsumable' under a certain article of law.

Another factor of legal storytelling we should pay attention to is the communicative situation in which the story is told. The suspect who tells his story at the police station is forced to tell his story.

This may be only a relative distinction in comparison to ordinary storytelling, because in everyday life there are strong expectations upon us to communicate our experiences (in the form of a story) as well. But the sanctions within ordinary discourse are not so weighty as they are in legal discourse. The ordinary storyteller is only relatively more free to withdraw or to refuse to tell his story. The suspect tells his story within an interrogatory situation, with the consequences that he has hardly any possibility to link up his experiences, as is often the case in ordinary situations. In the legal setting, the monologue has no chance; even a deliberate ordering of the story elements is virtually impossible. Through being interactionally guided by an interrogator, the story becomes segmented, and therefore less 'personal'. The suppression of personality, which marks the intrusion of institutional power, illustrates the asymmetrical character of legal storytelling.³⁶

Can we still talk about something like a *story*, after the suspect's declaration has been transformed? Is a story still a real story after all its evaluative elements are removed? Once the story is semantically and textually translated into the form of an institutional file, it becomes difficult to recognize the core of the original story. A documentary file is supposed to function as the final determination of the 'fact';³⁷ it is supposed to meet the very interest of

³⁵ It is however questionable to what extent the original suspect's story may be called non-institutionalized. Presumably the suspect adapts the contents and the structure of the story to what he expects the police officer wants to hear. Also, the suspect will select those elements which he assumes will be favourable to him.

³⁶ Ludger Hoffman, *Kommunikation vor Gericht*, Narr, Tübingen, 1983, p. 100 f.

³⁷ Otto Ludwig, "Berichten und Erzählen-Variationen eines Musters", in *Erzählen in der Schule*, Ehlich, Konrad (Hrsg.), Narr, Tübingen, 1984, p. 49.

the lawyers involved, namely the construction of information on the basis of which conclusions may be drawn with regard to the hearability of the 'fact'. Does this subsequently mean that the story remains without any function, in contrast to the documentary file? Is it true that, as Ludwig states, the file is not so much aimed at the removal of tense, as only at the determination of the fact, or only at the description of a cause-effect relation?³⁸

Through the transformation of the original suspect's story and retaining it during the whole process (although reshaped in the form of a police record, a summons, an information report or a crime sheet), law is made able to attain an optimal balance between the suspect's interest and that of the legal institution. In a way, the suspect is compensated by the opportunity offered by the legal institution, namely to tell his story as fully and as completely as possible. On the other hand, the institution is compensated by the opportunity to select the most relevant elements from this story and to reshape it according to the norms of law. Transformed or not transformed, it is the story which remains the original and ultimate basis of the legal interpretation and the legal decision-making. As in historiography, the value of (legal) truth is determined less by the underlying facts than by the narrative construction and interpretation of these 'facts'.³⁹

4. DO WE NEED A NEW CONCEPT?

Both in legal philosophy and in legal hermeneutics, various models of legal reasoning have been developed. Because of their de pragmatization and severe reduction into formal logic models of truth finding, these models can hardly be called satisfactory for those who are curious not only as to the final outcome of legal truthfinding, but also as to the process of transpositions in order to attain conviction of truth. Of course we should not play down the scientific need for abstractions and simplification of perceived reality. But do we therefore take the existing models for granted?

A closer investigation of the epistemological presuppositions behind the generally accepted models of legal reasoning shows the use not only of the linguistic theory of depiction but also of the 'observability-of-facts' principle. According to the positivistic dogma, facts are the only possible objects

³⁸ *Idem*, p. 49.

³⁹ F.R. Ankersmit, *Narrative Logic. A Semantic Analysis of the Historian's Language*. Krips Repro, Meppel, 1981, p. 1.

of knowledge. Facts, therefore, should be investigated by means of a method analogous to that of the natural sciences. A positivist doctrine can only adopt scientific methods according to which nothing can be truthfully said to exist, unless it is in principle observable by human beings. For two reasons, the positivist legal doctrine has difficulties in holding this proposition. One reason is philosophical, the other practical-discursive in its character.

A fairly high consensus seems to exist about the truth of the existence of a table when somebody points at an object that we generally call 'table'. More difficulties and less consensus seem to exist with regard to the truth of the *fact* of murder when we refer to an action which is generally called 'murder'. In the first case, we discuss the existence of static *objects*. In the second case, we discuss the existence of *actions* that change situation X into situation Y, and which are - as we suppose - preceded by *intentions*. In Penal Law (in the Netherlands: Wetboek van Strafrecht), the position of proving intentions behind certain actions is often decisive. Though we might endlessly discuss the observability of objects versus actions, the observability of intentions itself is problematic. Intention may only be discovered, or rather, stated, by observing the *result* of intention. The intention of committing a murder will not be discovered until somebody is found killed (or perhaps severely wounded). Judicial construction pays attention to the 'observable' consequences of intention.

Within this context, Van Dijk distinguishes between 'positive' and 'negative' actions.⁴⁰ Positive actions or facts are those that change situation X into situation Y. Negative actions are actions which do not accomplish these changes, for example, preventive actions, mental actions without a physical change and omission.⁴¹ "The theoretical difficulty with 'negative' actions is that they qualify as actions although there is no (observable) doing as defined (...)." ⁴² The observability of a fact is, when it considers an action instead of an object, problematic.

The second complication thrown up by the 'observability-of-facts' principle is that we do not observe actions neutrally, but evaluatively, or - certainly in the case of legal affairs - *normatively*. The (criminal) action is not

⁴⁰ Teun A. van Dijk, "Philosophy of Action and Theory of Narrative", in *Poetica* 5, 1976, p. 295 f.

⁴¹ Omissions are however a type of action which is sometimes valid (and thus hearable) within Penal Law, like non co-operation in breathalyzer tests.

⁴² Teun A. van Dijk, *op. cit.* 1976, p. 296.

observed because it is normal, but because it is abnormal, or perhaps *wrong*. Entering a bus is automatically identified as being non-criminal. Passing a red traffic light on the other hand is automatically identified as abnormal, or ultimately, as criminal. Therefore, the legal practice of factfinding cannot approximate the relative (!) neutrality of observation as it is practised in the natural sciences.

The other, more practical reason why legal practice cannot hold the 'observability-of-facts' principle is that the question "Who is the actual observer?" cannot always be clearly answered. Except for those cases where the police officer is directly on the spot (say, when a police officer is the immediate witness of a pickpocket's hand sliding into a lady's purse), most of the factual observations are made *after* the committal of a criminal action (for example, a shop owner who calls the police after having observed that his shop windows are broken) or - sometimes even simultaneously - on the basis of witness testimonies. In these cases, the story about the action is told by non-legal actors. This however is not of primary importance. But immediate observation of a criminal fact by legal actors is not always the case. To what extent is the legal discourse dependent on external declarations (e.g. stories)? Testimonies - often on the basis of an interrogation - of suspects and witnesses form a necessary condition for the statement of fact in those cases where there is no immediate observation of a legal kind. Consequently, only the story (and even those which are reported by legal actors) can offer a basis of legal truthfinding. However, "the problems inherent to the narratio cannot be reduced to the problems concerning statements".⁴³ The true-false distinction *concerning statements* of fact becomes worthless, because it is the accompanying story which is decisive. Truth does not concern the consistency of succeeding statements, because, even if the sentences are proven to be true, the discursive unity may be false. Within this context, truth can be no more than a pragmatic criterion of reliability of perception, correctness of interpretation, interference and credibility of the information.⁴⁴ And as long as we conceive the accomplishment of coherence as a set of narrative jumps, we should admit that the test of 'pragmatic truth' happens at various succeeding stages in the development of the story.

Following the line of the last argument, we arrive at another presupposition of legal doctrine we would like to criticize, which is the reduction to the opposition between *fact* and *text*. A legal case is often regarded as an input-

⁴³ F.R. Ankersmit, *op. cit.* 1981, p. 2.

⁴⁴ Teun A. van Dijk, *op. cit.* 1976, p. 309.

output happening of criminal fact at the one side and legal text (law) at the other side. The process or continuum between the poles, or even the involved contextual factors before and after the legal case, are neglected. This presupposition also shows severe simplification of legal reasoning. The fact is determined. The relevant rule is applied. The conclusion can be drawn. An acceptance of the subsumption model is easy if we overshadow the various transformations which are part of the creation of the legal case.

Why is a difference made between fact and text if the fact is not a fact of reality but a narrated fact?⁴⁵ In other words, judges, advocates and prosecutors do not interpret raw facts, but transformed facts. The raw fact, if it exists, has already been constructed as a legal fact. The construction of a narrative text base normally implies the application of deletion and integration rules, by means of which the text base can be transformed. In recalling an event, we often do not repeat the propositions in the same way.⁴⁶ Facts, therefore, are filtered reproductions of social reality, which are mediated by texts, legal or non-legal, written or oral. From the legal point of view, the text fulfils the function of the minor premise in the subsumption model;⁴⁷ first the fact has to be classified so that it can be placed against the background of the major premise, the legal norm. Our curiosity is however, directed at the exact *mechanisms* of this classification process, this qualification of raw material into a legally hearable case. Our analytical tool will be that of narrative coherence.

5. PROPOSALS FOR EMPIRICAL ANALYSIS

The functioning of narrative coherence may be investigated at the following three levels:

⁴⁵ Within this context, the German distinction between *Tatbestand* and *Tatsache* may be relevant. The term *Tatbestand* mainly refers to the actual state of affairs or to those elements of a punishable fact that have to be integrated in the record; findings, evidence. The term *Tatsache* refers to the accomplished fact ('fait accompli'). Both concepts are legally relevant, since the first one covers the so-called ordinary reality, while the second one covers the integral legal transformation.

⁴⁶ Teun A. Dijk, "Recalling and Summarizing Complex Discourse", in *Text Processing*, W. Burghardt, and H. Hoelker (eds.), De Gruyter, Berlin, 1979, pp. 49-118.

⁴⁷ To subsume can be explained as 'to bring under', 'to subjoin' and as 'to state a minor premise' (Oxford English Dict.). The subsumption process is aimed at the incorporation of an idea, a proposition or a case "under a comprehensive or inclusive classification or heading" (*Collins English Dictionary*).

1. *the textual level*: the analysis of the local cohesion among the textual elements within the limits of a text (in this case: the story);
2. *the discursive level*: the mode in which the narrative text is linked up with other texts and discursive units (e.g. articles of law, the file, the courtroom interrogation); at this level text-processing, in interpretation and (re-) production of the narrative are of importance; the story is regarded either as an integral part of the communicative and interactional process, or as the result of the process of storytelling;
3. *the justificatory level*: the legitimative and justificatory force of the process of narrative at the succeeding stages of story construction.

The analysis of the three levels should be done sequentially because narrative cohesion (level 1) is a necessary precondition for the construction of narrative coherence at the discursive level and so forth. What ways do we have of investigating these levels?

At the textual level, we might first take a look at the separation and structuralization of thematic sequences. In every proposition a new bit of information is added to the thematic story. The elements within these propositions are - with the support of the coreferential devices mentioned earlier - mutually related or related to previous or succeeding elements in other propositions. The analysis of these dispositions develops a *textual grammar* which brings out the hierarchical structuralization of the theme more clearly. However, not only the semantic structure but also the construction of successive *action steps* and *temporal positions*⁴⁸ may be revealed by this kind of analysis. We must take into account, however, that "(...) a narrative does not have an intrinsic function based on semantic information. Instead, in the interactive situation the narrator and listener attribute one or more functions to the narrative; storytelling also means that the listener has the responsibility of showing his having understood the functions of the narrative (...)"⁴⁹

At the discursive level, we are interested in the way the story itself, or its elements, is linked up with the environmental legal discourse. The analysis moves itself on the level of textprocessing, textreproduction and textcontextualization. If we start with the suspect's story at the police office, we might try to find out what relevancy criteria govern the selection of the story parts. In other words, how and on what basis is the story transformed into a legal one? This implies a closer analysis of the transpositional tools used.

⁴⁸ See Wladimir Propp, *The Morphology of the Folktale*, University of Texas Press, Austin and London, 1979 (1968).

⁴⁹ Elisabeth Cülich and Uta M. Quasthoff, *op. cit.* 1985, p. 176.

The next phase considers how this transformed story is further developed within the (penal) process: How is the story translated into file texts, like the summons and the information report? Not only will there be a translation, but also an embedding of the story so that it fits within the legal discourse. This aspect mainly involves an analysis of intertextuality, of the coherence among the various texts.

Finally, we may raise the question to what extent the story is changed due to the constraint of processes like scripturalization (e.g. the suspect's oral story into the written police record) and oralization (the written file as it is cited, paraphrased and summarized during the courtroom interrogation).

These textual transformations are accompanied by institutional patterns of action. Within the limits of the story, the legal actor has an opportunity for an outbreak to strategies which are derived from former precedential experiences: the legal knowledge and experience of the legal actor may be connected with goal-oriented action. The legal actor is like a chess player, because the story and its elements may be used for all kinds of mutation in order to achieve the most favourable interpretation and/or narrative coherence ... as long as they behave according to the rules of the game.

Analysis of the justificatory level lies beyond the capacities of discourse analysis: it looks at legal-normative judgements for their acceptability, seeing whether these story elements are correctly related to the environmental legal discourse. The question is not whether the final judgement is acceptable or not, but whether the story is discursively organized in such a way that we can take subsequent decisions. This level, finally, corresponds to MacCormick's notion of narrative coherence⁵⁰ and falls within the scope of legal philosophical analysis. MacCormick defines narrative coherence as the justification of the findings of a fact and the reasonable inferring of evidence: "Narrative coherence' is my name for a test of truth or probability of fact and evidence upon which direct proof by immediate observation is unavailable."⁵¹

The remaining problem is the empirical investigation of the justificatory level of narrative coherence. The only possible tool might be a post-construction of the relation between legal story and motivation of legal judgement. Analysis of the justificatory level is possible only after careful analysis of the textual and discursive level of narrative coherence.

⁵⁰ N. MacCormick, "Coherence in Legal Justification", in Werner Krawietz (Hrsg.), *Theorie der Normen*, Duncker & Humblot, Berlin, 1984, pp. 37-55.

⁵¹ *Idem* p. 48.

6. THE ROLE OF INTENT IN THE FACTFINDING PROCESS

In order to investigate the empirical functioning of narrative coherence within legal discourse, we will analyze a Dutch criminal case, which concerns the proof of intention to kill or to inflict severe bodily harm on a person. We shall therefore work with a transcript which was written after recording the accompanying courtroom interrogation.⁵² First we will briefly summarize a post-construction of the story. Then we will successively discuss the penal concept of intention and look at the relevant parts of the transcript concerning intention. Those relevant parts are performed by, respectively, defendant, public prosecutor, judge and defence. Our interest is directed at the divergent concepts of intention, and at the narrative transformations which are required for the attainment of a sufficient level of legal-normative coherence.

6.1 *The story*

Suspect Jansen is the brother-in-law of victim Bertinus. Within the family, some problems exist about the tools of Jansen's father-in-law. For a while, suspect Jansen lived in his father-in-law's house. During his stay there, he did up the house. Because Jansen did not receive any (financial) compensation for this work, he took the tools with him when he moved out of the house. However, the family problems escalated when the brother-in-law Bertinus visited Jansen one Saturday morning.

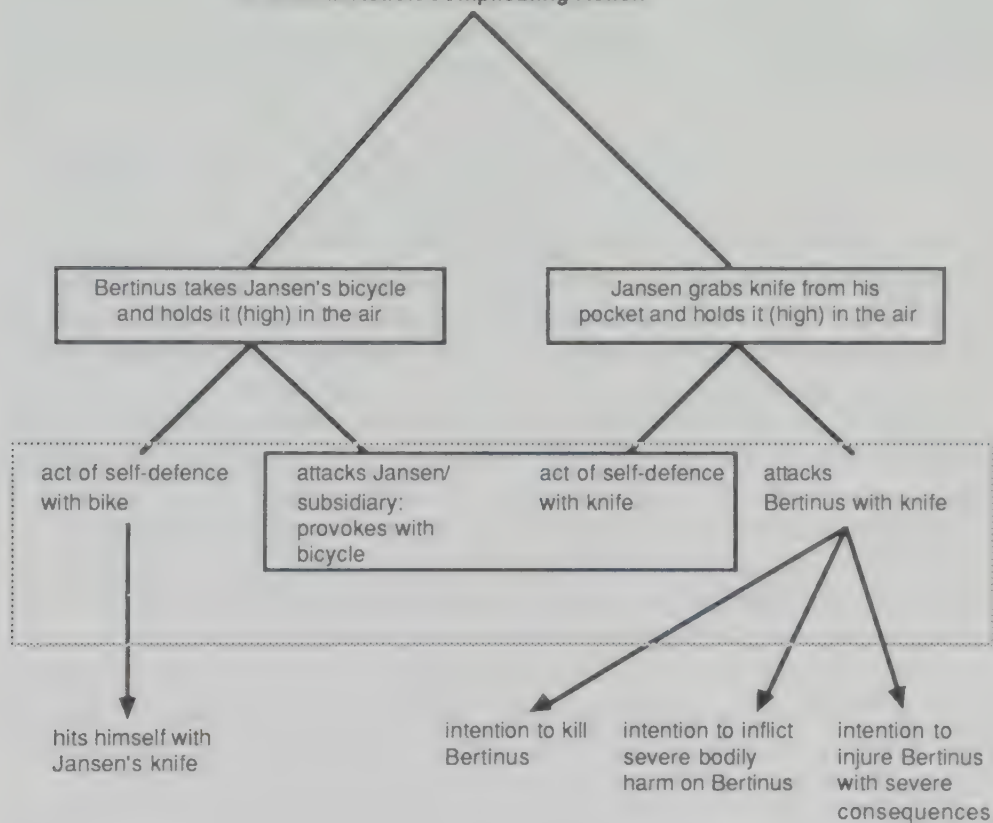
Bertinus snatched a conifer out of Jansen's garden and threw it through the window. Jansen shouted at him, but Bertinus left the place and went home. Jansen found a big stone, and with this stone followed Bertinus on his bicycle, of course with the intention of throwing the stone through the window of Bertinus's house. When they met each other again near Bertinus's house, Bertinus picked up an axe-haft. So Jansen decided to borrow a spade from Bertinus's neighbours. However, bystanders succeeded in calming down the critical situation.

⁵² In 1986, a number of recordings were made at Police Court ('*politierechter*'; comparable to the Magistrate's Court in Great Britain) by a team from the Department of Language and Literature of the Katholieke Universiteit Brabant. The team consisted of Monica den Boer, Henk Pander Maat and Christoph Sauer. The names of the actors in the transcript are disguised. Appendix II offers an explanation of the transcript symbols. Appendix I concerns the organization of the criminal court.

Story-Model

Orientation: Quarrel Suspect Jansen/Victim Bertinus about tools in family

- Action-steps: 1. Bertinus snatches conifer out of Jansen's garden and throws it through Jansen's window
 2. ? Dispute Jansen/Bertinus?
 3. Bertinus leaves
 4. Jansen follows Bertinus on bicycle.
 Stone on the back of the bicycle.
 5. Bertinus takes an axe-half, Jansen takes a spade.
 6. Break: environment calms down
 7. Struggle Jansen/Bertinus?
 8. **Central Action/Complicating Action**



Result: Bertinus is severely injured

Coda: Jansen tries to help Bertinus, but does not get a chance because many people are present, trying to save Bertinus's life

The witnesses' testimonies do not entirely concur about what happened afterwards. It seems to be sure, though, that Bertinus grabbed Jansen's bicycle and held it up in the air. Jansen felt threatened. He discovered a knife in his pocket and held it up in the air too. How it exactly happened is again unclear, but what is certain is that Bertinus found himself severely wounded. His injuries were so severe that he might have died, but bystanders managed to save his life. Jansen attempted to offer help to Bertinus as well, but there were too many people around for him to be of any assistance.

The suspect's social and psychological background is as follows: Jansen is a neurotic person, and because of this he has been addicted to medicines. However, after voluntary psychiatric treatment (not very long before this event), he has tried to kick the habit. Jansen is rejected by the doctor and is therefore without employment. He has a family which has just increased in number. Jansen has never had much contact with either his wife's family or his own.

6.2 Intent in Dutch Penal Law

The concept of 'intention' is not defined within Dutch Penal Law. However, in the doctrine of Penal Law, intention stands for the will of the actor aimed at doing something which is forbidden by the law, or at not doing something which is ordered by the law. Intention (*dolus*) is a part of guilt in the broad sense of the word (*culpa* is the Latin word for guilt in the narrower sense). Accusation of a certain intention must be directed to all the parts or details of the 'fact'. In Dutch Penal Law a distinction is drawn between *dolus delicts* - involving intention - and *culpa delicts* - involving blame only. *Dolus delicts* lead to a heavier sentence. There are three dogmatic versions of intention:

1. necessity: action X necessarily leads to consequence Y;
2. probability: action X probably leads to consequence Y;
3. possibility: action X possibly leads to consequence Y.

In the present case, we have to do with conditional intention (*dolus eventualis*), which exists if the actor has been aware of the possibility (or probability or necessity) of a certain consequence of his action, though took the risk into the bargain. In Penal Law this is always equal to intention.⁵³

According to Ross,⁵⁴ the concept of *dolus eventualis* has its ideological roots in the idea of the evil will. It stands for a cliché which covers reality in

⁵³ *Juridisch Woordenboek*, Fokkema Andreae, p. 359.

⁵⁴ Alf Ross, *Über den Vorsatz*, Nomos, Baden-Baden, 1979, p. 113/100.

a determination. Intentionality is always a matter of fictivity or hypothesis. If we take intention after its determination as a fact of evidence, we create causality within the story. We transform the fact into an objective happening, although it must be subjectively explained by means of the actor in the story.

What we can notice first and foremost is that evidence of bodily harm is the precondition for finding evidence of intention. A person is not called into court when the consequences of his intention are unknown. For example, a woman who intends to let herself be aborted cannot be accused until evidence can be shown with regard to the action of abortion itself. In Criminal Law, there is no rule about 'the mother who has the intention to kill her child...' The intention must have an observable consequence, so the rule is formulated as: 'the mother, who *intentionally kills* her child...' It is the visible action plus outcome (including the adverbial state of intention), which is decisive. "Eine Handlung beginnt nicht erst, wenn der Aktant sichtbar eine Bewegung, einen Ausruf, ein Signal usw. auf dem Handlungsfeld macht."⁵⁵ Van Dijk notices that this represents a mode of practical reasoning or practical syllogism: *we identify actions as values of an intentional function.*⁵⁶

Within this context, Probert reminds us of Dr. Kennedy's complaint, namely that "intent is measured by foresight of caused harm without regard to whether harm is wanted or desired".⁵⁷ Probert continues, stating: "(...) legally speaking it is said that a person intends certain consequences if he foresees them, even though he had some other purpose in mind and did not have those consequences as an end, or a means."⁵⁸ "If damage is foreseeable - not foreseen in the sense of known but foreseen in the sense of possible or probable, maybe the only valid way of using the word - if damage is foreseeable and if damage occurs, that does not make the actors' conduct negligent in and of itself, and indeed there are some circumstances when harm is foreseen in the sense of known certainty that is not said to be intended."⁵⁹

⁵⁵ Jochen Rehbein, *Komplexes Handeln. Elemente zur Handlungstheorie der Sprache*, J.B. Metzler, Stuttgart, 1977, p. 143.

⁵⁶ Teun A. van Dijk, *Philosophy of Action and Theory of Narrative*, 1976, p. 294 ff.

⁵⁷ Walter Probert, *Law, Language and Communication*, Charles C. Thomas, Springfield, 1972, p. 311 (Exhibit V: The Roles of Intent in the Law of Crimes and Torts).

⁵⁸ *Idem*, p. 318.

⁵⁹ *Idem*, p. 319.

We may notice the semantic ambiguity of words like 'foreseeable', 'negligent' and 'intention'. States of mind cannot be 'observed' as a fact and therefore represent logical spaces (gaps) in the legal discourse. However, the legal definition of legal terms is always a question of 'more or less'; an application of a legal term always implies a new interpretation. Legal terms do not represent a fixed and definite meaning, that is, they may be explained differently in divergent situations. In this respect legal agents are situated in a space where new norms may possibly be created. But especially with regard to concepts like 'intention', 'negligence' and 'foreseeable' there remains a high level of contextual semantic ambiguity. A reason for this uncertainty might be that lawyers have to find evidence for 'subjective criminality', as Fletcher calls it.⁶⁰

The pattern of subjective criminality presupposes a normative standard of what somebody should (not) have done in case of a given state of affairs. These are "nominally descriptive terms with a moral force".⁶¹ The necessary precondition for the validity of this normative rule is that it applies to reasonably thinking people (it excludes mental abnormality, disease or provocation).

This norm is sustained by "(...) a form of the ancient belief that possession of knowledge of consequences is a sufficient and necessary condition of the capacity of self-control, so that if the agent knows the consequences of his action we are bound to say 'he could have helped it (...)'"⁶² This *ancient belief* however is valid not only within legal discourse, but also in ordinary discourse. I could have known that my car would be crashed into after parking it right at the corner of the street, for example, or I could have known that my stomach would hurt after eating a kilo of unripe plums.

The legal gap thus especially considers the observability of an invisible action, or a *negative action*.⁶³ The mental action itself does not change anything in the situation; it is the mental action of intending to hurt Bertinus that eventually leads to the *positive* (visible/observable) action of stabbing.

⁶⁰ George P. Fletcher, *Rethinking Criminal Law*, Little, Brown & Company, Boston/Toronto, 1978.

⁶¹ *Idem*, p. 369.

⁶² Hart, L.A. Herbert., "Negligence, Mens Rea and Criminal Responsibility", in M.L.A. Hart, *Punishment and Responsibility. Essays in the Philosophy of Law*, Oxford, 1968, p. 150 (136-158).

⁶³ Teun A. van Dijk, 1976, p. 295 f.

Self-evidently, the question whether negative actions are traceable becomes heavily loaded within legal discourse because of its punishability.

6.3. *A narrative account of what happened*

In this section we will successively take a look at the varying narrative accounts of the event, especially those parts which are relevant for the role of intention.

6.3.1. *The suspect*

During the courtroom interrogation, it turns out that the *common conception* of intention is different from the *legal conception of intention*.

The defendant verbalizes the common conception as follows:

- 120 V ik was me d'r eigenlijk ik was
S I was actually /I was
- 121 V me d'r niet van bewust eigenlijk dat ik een mes
S unaware actually that I had a knife
- 122 V bij me had, maar door machteloosheid/ik stond dus
S with me, but because I felt powerless /I was
- 123 V eigenlijk/we hadden alle beiden eh onze spullen*
S actually/both of us had put away
- 124 V weggelegd en (.) waarop ik/ waarop ik w/w/wilde
S our stuff* and (.) after which/ after which I w/w/wanted
- 125 V weggaan dus met de fiets maar waarop dus
S to leave on the bicycle so but at that point
- 126 V Bertinus de fiets pakte hh en eh: hh opgeheven
S Bertinus picked up the bicycle hh and ah: hh lifted it
- 127 V van de grond op mij inkwam ((snuft)) en (.) ja (.)
S off the ground came towards me ((sniffs)) and (.) well (.)
- 128 V gewoon vanuit machteloosheid zeg maar zoals ik
S just because I felt powerless so to say as I
- 129 V n/net al zei hh dat wanneer ik een zakkam op
S j/just said hh that if I'd had a
- 130 V dat moment misschien in m'n/in m'n zak had
S pocketcomb maybe in my/ in my pocket

* the spade and the haft.

- 131 V gehad, had ik 'm ook nooit () dus eh
S I would never have () him so eh:
- 132 V nou en op een gegeven moment. Die verwondingen.
S well and at a certain moment. Those injuries.
- 133 V Hij kwam dus op me in. 't Was absoluut niet de
S So, he came at me. It was absolutely not the
- 134 V bedoeling laten we zeggen om hem / laten we
S intention so to say to / so to say
- 135 V zeggen eh: op/op een dergelijke manier te verwonden
S ah: to/to injure him in such a way

The common conceptualization as it is verbalized by the suspect is connotated with a state of consciousness or awareness (120-121), and with circumstantial actions (e.g. provocation, 128). The coherential framework of this story version is accomplished by presenting the actions in a conceivable, evaluative way; the suspect's story is not so much about the actions themselves, but about how the suspect felt during the succession of these actions; this represents a form of post-interpretation or post-evaluation. The suspect composes a so-called *Leidensgeschichte*, a story of a person who suffered, in order to make his actions comprehensible, plausible and justifiable.⁶⁴

This implies a form of *Selbstdarstellung*:

- I was not really aware that I had a knife with me (120-121): I did not have the intention to bring my knife from home when I followed Bertinus.
- I felt powerless (122): it was an act of self-defence.
- we had put our things away, after which I wanted to leave on my bicycle (123-125): goodwill.
- Bertinus attacked me (125-126): self-defence.
- I felt powerless (128): self-defence.
- if I had had a pocket comb I would never have injured him like that (128-131): absurdity of having the intention to use the knife.
- Bertinus came at me (133): self-defence.
- conclusion: it was not my intention to injure Bertinus so badly (133-135).

⁶⁴ Jochen Rehbein., "Beschreiben, Berichten und Erzählen", in Konrad Ehlich (Hrsg.), *Erzählen in der Schule*, Gunter Narr Verlag, Tübingen, 1984, pp. 67-124.

6.3.2. *The Prosecutor*

The Public Prosecutor accuses suspect Jansen of three subsidiary facts, which all centre around *intention*:

1. Jansen is alleged to have had the intention to deprive Bertinus of his life. He had used his knife intentionally. Art. 287 Dutch Penal Code (manslaughter);
2. Jansen is alleged to have had the intention to inflict severe bodily harm on Bertinus. Art. 302-1 Dutch Penal Code (severe ill-treatment);
3. Jansen is alleged to have had the intention to injure Bertinus, with very severe consequences. Art. 301-2 Dutch Penal Code (ill-treatment with severe consequences).

The Public Prosecutor interweaves his accusation (the legal concept of intention) with the story as follows:

- 290 O Aan de andere kant is't zo als men
P On the other hand it is the case if you
- 291 O naar 't middel kijkt dat gebruikt is kun je
P look at the tool that is used you can
- 292 O zeggen dat meneer Jansen wel degelijk (bekend)
P say that Mister Jansen really did (know)
- 293 O is, dat mgs dat meneer Bertinus/datmeneerJansen
P that knife that mister Bertinus/that mister Jansen
- 294 O gebruikt heeft is wel duidelijk geschikt om
P used is clearly capable of
- 295 O iemand om het leven te brengen. In ieder
P taking somebody's life. At any
- 296 O geval om zwaar lichamelijk letsel te
P rate to cause severe bodily harm
- 297 O veroorzaken. Hh. Eh: ((kucht)) Ik denk toch wel
P Hh. Ah: ((coughs)). I still think
- 298 O dat verdachte op dat moment begrepen moet
P that the suspect at that moment should have
- 299 O hebben (.) dat als je dan op deze manier op zo'n
P understood (.) that if one then in this way at such
- 300 O korte afstand hen d'r is een getuige bij die
P a short distance, eh? and there's a witness who
- 301 O 't ook zegt (.) hoe verdachte dus met dat mes
P says that too (.) how the suspect wielded
- 302 O gehanteerd heeft, dan is 't niet eh onwaarschijnlijk

- P that knife, then it is not ah very unlikely
 303 O dat iemand zo geraakt kan worden (.) dat daardoor
 P that somebody can be hit in that way (.) that by that
 304 O eh zwaar lichamelijk letsel ontstaat. Eh (.)
 P ah severe bodily harm is caused. And (.)
 305 O gebleken is dat eh verdachte/ het slachtoffer
 P there is evidence that ah the suspect/ the victim
 306 O ook het slachtoffer Bertinus behoorlijk geraakt is.
 P also the victim Bertinus was severely hit.
 307 O En, een slagader van die man is/is/is geraakt
 P And, an artery of that man was/was/was hit
 308 O en als 'r dus niet eh tijdige laten we zeggen die
 P and if the right help wasn't ah let's say
 309 O juiste hulp was geboden dan had ie kunnen
 P offered then he could have
 310 O doodbloeden. Ik denk dan ook mevrouw de
 P bled to death. I thus think madam
 311 O politierechter dat eh (.) 't eh subsidiaire waarover
 P magistrate that ah (.) the ah subsidiary that I was
 312 O ik 't nu net gehad heb, de bedoeling om Bertinus
 P talking about just now, the intention to inflict
 313 O zwaar lichamekijk letsel toe to brengen, dus Bertinus
 P severe bodily harm on Bertinus, that is to hit
 314 O zwaar te treffen met das mes (.) dat eh die
 P Bertinus hard with that knife (.) that ah that
 315 O bedoeling inderdaad voor 'm gelegen heeft in ieder
 P intention must have presented itself to him in any case
 316 O geval (.) eh:m moet verdachte toch wel geweten hebben
 P (.) ah:m the suspect should have known
 317 O dat in een dergelijk optreden iemand zo
 P that by acting like this one (can hit) somebody
 318 O ernstig en zwaar (kunt raken).
 P seriously and severely in that way.

The prosecutor claims the knife as the clue of his narrative argumentation. Narrative argumentation is a mode of arguing which implies the acceptance of certain factual evidence. In other words, the story remains underneath the prosecutor's argumentation. He uses story elements as accomplished facts in support of his argumentation. It is the aim of the prosecutor to show that in the case in point we have to do with intention, and not with mere guilt.

Quite confusingly, the prosecutor mixes up the argumentation of the three subsidiary facts with the argumentation of the three dogmatic versions of intention. The three dogmatic versions (necessity, probability and possibility) are expressed by modal verbs or adverbs. In 298 we notice the use of the verb 'should' for necessity, in 302 we notice the use of the adverb (not) 'unlikely' for probability, and in 318 we notice the use of the modal verb 'can' for possibility. As already stated, the prosecutor's attempt to show some kind or other of intention is completely entangled with the argumentation of the legal application of a certain article of law.

The starting point for the prosecutor is, as already said, the knife: the knife is a suitable means in principle to kill somebody or to inflict severe bodily harm on somebody (290-297). The norm of knowing what the consequences of using a knife might be is expressed in 297-299. The norm is sustained by details from witnesses' testimonies (short distance, the way of wielding that knife) (300-302). The evidence has shown that Bertinus was severely hit and that he could have died (304-310). Conviction that Jansen indeed intended to inflict severe bodily harm on Bertinus is expressed in 311-315. In 316-318 there is a repetition of the norm that Jansen should have been aware of the possible consequences.

6.3.3. *The Judge*

More clearly than the prosecutor, the judge denominates the type of intention; she argues that this is a case of *dolus eventualis*, or a form of possibility intention, which is closest to guilt (*culpa*). A hypothetic construction of the cause-effect relation determines her view of the bad ending of the story:

- 571 R (.) Eh: m d'r staat onder andere
 J (.) Ah: m among other things there's written
- 572 R dat u 't opzettelijk gedaan hebt en ik begrijp
 J that you have done it intentionally and I understand
- 573 R dat u: dat niet zo goed begrijpt omdat u nooit de
 J that you: can't understand that very well because you never
- 574 R bedoeling hebt gehad om 'm dood te maken
 J had the intention to kill him
- 575 R of om 'm zwaar te verwonden, maar 't is nou
 J or to injure him severely, but it happens to be
- 576 R eenmaal zo dat toch (.) wij 't toch opzet noemen
 J that still (.) we still call it intention
- 577 R wanneer u iets gedaan hebt waarvan u/waarvan
 J when you have done something of which you/of which
- 578 R u ehm eh had kunnen weten dat 't heel slecht

- J you ahm ah could have known that it would have
 579 R had kunnen aflopen. Eigenlijk iedereen die met
 J a very bad ending. In fact anyone who
 580 R een meszwaait in de richting van een ander
 J wields a knife in the direction of another
 581 R heeft op die manier toch zeggen wij de opzet he
 J does have in that way, we say, the intention eh?
 582 R heeft echt het risico genomen/de kans gelopen
 J really has run the risk/taken the chance
 583 R dat er inderdaad iets afschuwelijks zou gebeuren
 J that indeed something horrible might happen

The judge pays attention to the divergent (common versus legal) conceptualization of intention (571-575), but makes clear that the legal concept of intention is applicable to Jansen's action, because - and here too the norm is repeated - he could have known the consequences (578-579) or did take the risk that something 'horrible' would happen (581-583).

It is the task of the judge to harmonize the interest of the suspect and the interest of the legal institution. She has to show a well-balanced decision, which removes potential tensions on the part of both parties. This might be the reason for the use of various euphemistic expressions ('among other things', (571), 'in fact' (579), 'does have in that way' (581)), and the show of appreciation or sympathy (572, 573).

6.3.4. *The Defence*

The defence tries - in the reconstruction of the fact - to show a lack of evidence with respect to Jansen's intention to kill Bertinus.

- 426 A en wat d'r dan vervolgens gebeurd is dat is (.)
 D and what happened afterwards that is (.)
 427 A niet helemaal duidelijk. Ehm (.) de getuigenverklaringen
 D not fully clear. Ahm (.) the testimonies
 428 A lopen daarover ook uiteen. De getuige A
 D about it are divergent. Witness A
 429 A die zegt bijvoorbeeld dat Bertinus, een forse man
 D for example says that Bertinus, a robust man
 430 A zoals hij dat noemt eh: de fiets opwierp naar
 D as he calls it ah: threw the bicycle up towards
 431 A de andere man, dat is dan Jansen. Getuige

- D the other man, that is Jansen. Witness
- 432 A B die ziet twee steken geven maar die
D B sees two stabs but he
- 433 A maakt bijvoorbeeld van de fiets helemaal geen melding wat
D does not for example mention the bicycle at all which
- 434 A ik toch wel (.) merkwaardig vind en waarom ik die
D I find a bit (.) curious and why I find
- 435 A getuigenverklaring ja (.) op z'n minst onvolledig
D that testimony well (.) at least incomplete
- 436 A vind. De getuige C die (.) spreekt
D Witness C he (.) is the only one
- 437 A enige bijvoorbeeld van een knokpartij die zou
D who speaks of a struggle supposed to
- 438 A hebben plaatsgevonden. Kortom, de getuigenverklaringen
D have taken place. In sum, the testimonies
- 439 A lopen nogal sterk uiteen. (.) Bertinus zelf (.) en dat is
D are strongly divergent. (.) Bertinus himself (.) and this is
- 440 A dan onder deze omstandigheden zeker van belang, die
D very important under these circumstances, he
- 441 A verklaart: "Ik geef de fiets aan Jan en hield die
D declares that "I gave the bike to Jan and held it"
- 442 A tussen ons in om me te verdedigen. Ik heb die fiets ook
D in between us to defend myself. I pushed that bike
- 443 A naar voren in de richting van Jan gestoken (.) toen
D forward in the direction of Jan (.) when
- 444 A "hij op mij afkwam. Dit was allegen om me te verdedigen."
D "he came towards me. This was only to defend myself."
- 445 A (.) En daar heb ik natuurlijk (.)
D (.) And there I of course (.)
- 446 A vraagtekens bij geplaatst onder deze omstandigheden.
D put some question marks under these circumstances.
- 447 A Die fiets kan je natuurlijk gebruiken als s/
D Of course one can use that bike as s/
- 448 A verdedigingsmiddelen, maar ook als aanvalsmiddel eh
D means of defence, but also as means of offence ah
- 449 A mijn (client kan) natuurlijk zeker omdat
D my (client may) of course certainly because
- R ((kucht))
J ((coughs))
- 450 A eh Bertinus ook eh sterker en zwaarder is eh zich

- D ah Bertinus is also stronger and heavier ah felt
 451 A bedreigd hebben gevoeld (.) en uit afweer misschien
 D himself threatened (.) and to defend himself took out
 452 A een zakmes heeft gepakt. Een zakmes, want dat
 D his pocketknife. A pocketknife, because that's
 453 A was 't. 't was niet een mes hh eh wat je normaal
 D what it was. It was not a knife hh ah that one would normally
 454 A in de keuken aantreft, maar 't was een mes wat
 D see in the kitchen, but it was a knife that
 455 A je (.) bij je kunt dragen. Hij kan dat eh naar voren
 D you (.) can carry on you. He may have ah brandished
 456 A hebben gestoken (.) en dan is 't ook denkbaar
 D it (.) and then it is also imaginable
 457 A dat Bertinus (heeft die zelf verklaard) met fiets
 D that Bertinus (he said this himself) with bike and
 458 A en al (.) op mijn cliënt instoot op die manier geraakt
 D and everything (.) pushed into my client is hit that way

The defence uses strategies that are made available by reconstructing the fact as a narrative fact. Bennett and Feldman state: "Storytelling operations make it possible to alter the interpretation of a story's central action through challenge, redefinition, or reconstruction of the story itself."⁶⁵ It is the reconstruction strategy - by means of witnesses' testimonies - which is predominant in the fragment above. The (new) reconstruction of the event challenges another interpretation. As Bennett and Feldman state: "A common defence in murder cases, for example, is to show that the defendant acted in self-defence. A plausible story on this theme must reformulate the three triads by showing that the defendant could have been at the scene without intending to kill the victim, that the defendant had no prior reason to kill the victim and that the means of causing death reflected a spontaneous response to serious provocation."⁶⁶ Apart from the re-interpretation as an act of self-defence, the defence seeks another strategy, which is that of showing gaps in the continuity of action-steps in the story (427-446). As already mentioned at the beginning of this chapter, the story is incomplete with respect to the presence

⁶⁵ Bennett and Feldman, *op. cit.* 1981, p. 98.

⁶⁶ *Idem*, p. 104.

of the knife and the bicycle, and the way in which suspect and victim respectively used these objects.

6.4. *Narrative jumps*

After analyzing the four versions of the story, we may notice that the story versions are different, but they do not mutually exclude each other. In fact they are compatible. Each version represents the personal interest of the respective communicative actor. Stories as such become the carriers of strategic goals; they become the object of an argumentative game.

The story model (ch. 6.1.) shows that it is unclear which actor was first; chronologically, the story remains quite hazy about the question who started to provoke the other. From the intentional point of view, one could also notice that the story remains hazy about the act of purpose: it is unclear whether Jansen held his knife in the air as an act of defence or offence. Finally, some details are lacking. How exactly did Bertinus hold the bicycle in the air? Did he lift it up, and if so, did he lift it up high into the air, and further, did he approach suspect Jansen by walking in his direction?

Summarizing those remarks, what emerges is that the major action in the story remains undefined. A major action is "any action which directly, or with other, major actions, has the intended final state (the 'goal' of the agent) to bring about this final consequence."⁶⁷ And it is exactly in this courtroom session where the intention, preceding the final state of the action, becomes obscured, by varying the representation of the event. The truth as a unified concept of 'what really' happened does not exist; it is the argumentative-pragmatic game with the story parts that decides what has to pass for 'the truth'.

Both the judge and the prosecutor evade the absence of evidence concerning the unclarities within the story. Their hat-rack is the (observation of the) knife. They lay bricks in the story by building in a legal-normative expectation of 'foreseeing the consequences'. In other words, the story represents a jump from the moment there seemed to exist peace between Jansen and Bertinus (action-step 6 in the story model) to the moment at which Bertinus was found severely injured ('Result' in the story model). However, it remains quite conceivable that the evidence shows gaps which cannot be filled in unless the story is contextualized within a legal-normative setting.

⁶⁷ Teun A. van Dijk, *Recalling and Summarizing Complex Discourse*, 1979, p. 18-44 (64).

It was Jolles in his *Einfache Formen*,⁶⁸ who showed us the similarity between the construction of legal cases and that of novels. The case poses the question, but does not offer any answer; the case forces us to take a decision, but does not contain the decision itself.⁶⁹ One may suppose that a story is told in such a way that it contains characteristics which facilitate its subsumption under a category of stories to which the article of law may be applicable.⁷⁰ The event becomes dominated by a possible sentence, and therefore the norm becomes interwoven with the *narratio*.⁷¹

The transformation of the original story (the suspect's story at the police office) is in large part constructed on the basis of selection. The story is re-constructed as a coherent (coherent as possible) succession of events by concentrating on one of the possibilities in the central action (action-step 8 in the story model): Jansen intentionally stabbed Bertinus. In order to create order from chaos, the invisible hand is arranged under three legal statutes. It will be either O or P or Q. Reality is fore-conceived or fore-interpreted in certain categories. The story only excludes what a person normally speaking could not have done in a certain succession of actions or events.

Except for the selection-strategy, one uses inquiry into the *mens rea* as a key to cohere the elements of the story. Once we find a reason for the committing of a certain action (causality), we are able to generate the story's content and meaning. Sticking to a certain stereotypical explanation facilitates the interpretation of the story.

We have noticed that the story (or better: the versions of the story) is situated within a network of dynamic moves. The surrounding discourse offers an opportunity for the exchange of rational and plausible story versions. As already said, the story becomes the ball in an argumentative game. In order to argue, we need something like a claim on 'what really happened'. Transformation processes, like those of selection and stereotypical *mens rea*

⁶⁸ Darmstadt 2, 1958.

⁶⁹ *Op. cit.* in Karlheinz Stierle, "Geschichte als Exemplum-Exemplum als Geschichte, Zur Pragmatik und Poetik narrativer Texte", in Koselleck, Reinhart and Wolf-Dieter Stempel (Hrsg.) *Geschichte-Ereignis und Erzählung*, Wilhelm Fink, München, 1973, pp. 347-375 (363).

⁷⁰ *Idem*, p. 354.

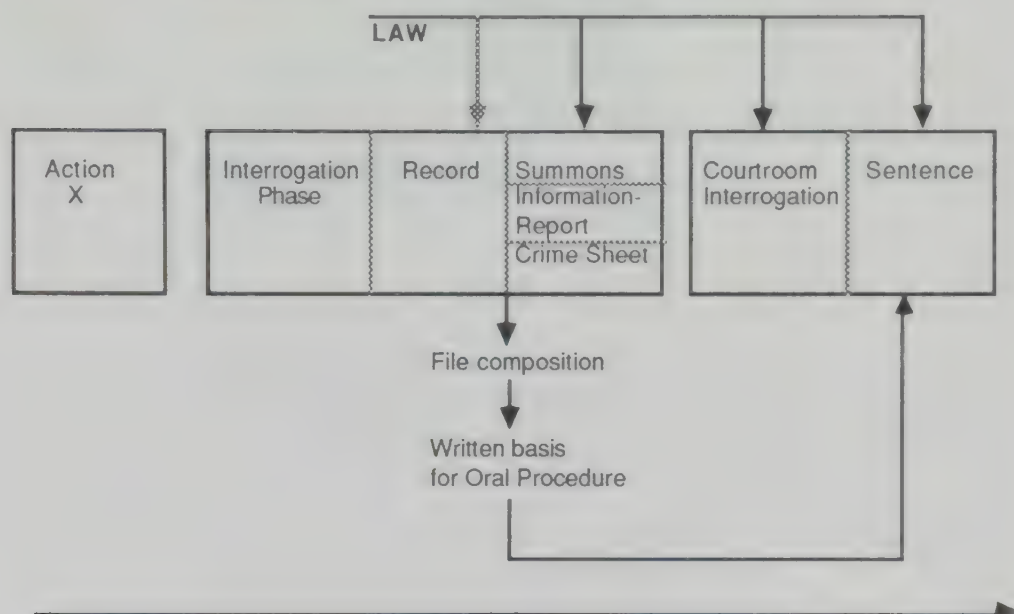
⁷¹ Herzog, Reinhart, "Zum Verhältnis von Norm und Narrativität in den applikativen Hermeneutiken", in *Text und Applikation*, Wilhem Fink Verlag, München, 1981, pp. 435-457, 441.

interpretation, carry the goal orientation of legal agents in order to structure and to substitute one story version for the other. We are left with one important question: What is it that guides or predominates legal coherence?

I would like to thank Anton van Kalmthout as well as the participants of the workshop 'Narrative Coherence' for their useful remarks.

APPENDIX I

1. Organization of the Penal Process (Grosso modo)



2. Organization of the Courtroom Session

- (1) Starting signal; suspect is called
- (2) Identification of suspect
- (3) Instructions to suspect (e.g. the right to remain silent)
- (4) Prosecutor reads accusation (summons)
- (5) Judge examines the facts
- (6) Requisitory by prosecutor
- (7) Pleas by defence
- (8) Last word by suspect

- (9) Motivation of sentence by judge
- (10) Legal means are pointed out (lodging of an appeal)
- (11) Defendant decides whether or not to make use of legal means
- (12) Closing signal

APPENDIX II

Use of Transcription Symbols

120	phrase no. 120 of transcript
V/S	verdachte/suspect
R/J	rechter/judge
O/P	officier van justitie/prosecutor
A/D	advocaat/defence
IR nu	V/S claims speech turn immediately
IJ now	after R/J
IV 't begon	
IS it started	
IR ja	
IJ yes	simultaneous claim of speech-turn
IV 't begon	
IS it started	
R gew/gewoon	repair
R (4.7)	pause (four point seven seconds)
R (.)	short pause (less than .5 seconds)
R ah:	prolonging a word (X:)
R hh	breathing
R ((coughs))	noise
R (ongeloofwaardig)	probably (ongeloofwaardig); it might equally be some other word
R ()	transcriber did not understand what was said
R <u>nou</u>	emphasis on underlined part of the word

THE NORMATIVE SYLLOGISM AND THE PROBLEM OF REFERENCE

BERNARD S. JACKSON

*All persons who blaspheme the gods are liable to be executed
Socrates has blasphemed the gods.
Therefore Socrates is liable to be executed.*

THE PROBLEM

The above is an adaptation into normative discourse of the classical syllogism. In order for it to work, for the purposes which we want it to perform,¹ we need to establish a number of links between the rule that the legislator has enacted, and the acts which Socrates has performed. First, we have to establish what Socrates did in fact do, and our principal means of doing this is through the testimony of witnesses (even in classical Greece). Secondly, we have to ascribe a legal character to the facts so found (do they constitute "blasphemy"?). Third, we have to be satisfied that the words used by the legislator "cover" this case. It is only if these conditions are satisfied that we would, conventionally (though not necessarily rightly), say that the judgement on Socrates is legally justified.

These processes involve a variety of relationships between language and the world, and indeed between different forms of discourse. In ordinary language, we might very well use the notion of "reference" to capture some of these relationships. We would certainly say that the words of the witness in court "refer to" the past events which took place in the world - indeed, the claim is made that these words are true, in the sense that that to which they refer truly happened. But we might also say that the words of the statute refer

¹ See further, *infra*, 2, p. 11.

to the case judged under it - or at least (which amounts to much the same thing) that the case is wrongly decided if the judgement relies upon that statute, whereas that statute does not (truly) refer to the case in hand.

It is to be noted that both of these uses of "refer" have a temporal dimension when used in this context - the context of adjudication. That temporal dimension does *not* exist when we consider the normative syllogism in the abstract as at the head of this paper. For what the syllogism in the abstract means is simply this:

If it is true that "all persons who blaspheme the gods are liable to be executed"

and if it is true that "Socrates has blasphemed the gods"

then must it be true that "Socrates is liable to be executed"?

Logic is atemporal. We might conclude that when the syllogism is used in doctrinal writing, it retains this notion of atemporality. For what is there at stake is not the relationship between the legal meanings of (as Kelsen would put it) two past events in the world, but rather the relations between propositions about them: "*if it is true that...*"

It is because doctrine lacks the temporal dimension, which I have argued necessarily exists when the normative syllogism is used in adjudication, that arguments for the deductive status of part of the legal reasoning used by courts in deciding cases² seems to me to be insufficient. But the nature of the insufficiency differs according to that part of the process of the adjudicatory syllogism (as I shall call it) that we are considering. The argument of this paper is that we have reason to abandon popular notions of "reference" as used in both of the contexts outlined above: both as regards the words of the witness in relation to the anterior facts to which he/she claims to refer, and to the relationship between the general rule of law (the major premise) and the legally determined facts of the case (the minor premise).

But before considering these objections, we should be clear as to what is at stake. It is not merely, in my view, a question of whether the ordinary linguistic usage of the verb "to refer" is philosophically well grounded in either of these two contexts. It is rather the values which underlie the use of such language. These values do require us to establish a relationship across time between the event which instituted the general rule and the event which the court is to adjudicate on the basis of that general rule. That value is that

² Most recently, and notably, Neil MacCormick, "Legal Deduction, Legal Predicates and Expert Systems", *The Modern Law Review* (1988) I am grateful to Professor MacCormick for sending me an advance copy of this paper, and for engaging in an illuminating correspondence about it.

of the Rule of Law, and in particular, its prospectivity. Even though we cannot guarantee 100% prospectivity, as even Lon Fuller would accept, we do make the claim that the Law is in general prospective.

Inherent in this claim is the more particular one that the vast majority of legal rules are expressed in language which allows us to predict in advance what the meaning of future acts will be in relation to them.³ Most rules, we would claim, have a literal meaning, which binds into one and the same community of interpreters, the legislators on the one hand and the recipients (both judges and subjects) on the other, such that citizens may choose their action in reliance upon sure knowledge as to the legal significance of what they propose to do. Whether this account of the normal operation of the law is true to reality hardly matters for present purposes. What does matter is the claim we make - most explicitly and recently by Neil MacCormick⁴ - that it is by virtue of this deductive process that decisions are justified. In other words, MacCormick relies upon the logical structure of doctrine in order to make the adjudicatory syllogism compatible with the Rule of Law.

The objections to the traditional view can also be expressed in terms of the notion of reference. There is both a "strong" and a "weak" objection. The "strong" objection derives from a position in linguistics which denies truth-conditional semantics, and which sees reference purely as a truth-claim made by people in particular circumstances - part of the pragmatics of the situation.⁵ Here, it would be argued, the words of a witness do not "refer" to the past events; those words construct a reality of their own, and the witness claims that we should believe that this constructed reality corresponds to what actually happened. However, since any account of what actually happened is constructed within a particular discourse, we cannot ultimately establish any link between the claim made in language and the outside reality, other than that of noting that the truth-claim is actually made. This, of course, entails a highly sceptical epistemology. To adopt it is not necessarily to regard any truth-claim as worth as much or as little as any other. In-

³ There is, it is true, a contemporary trend to downgrade the status of legislative intention as an interpretive tool in legal adjudication. But the context of such debates is largely that of "hard cases", which we claim (or at least Hart claims) to be the exception rather than the rule.

⁴ *Supra* n. 2.

⁵ See my *Semiotics and Legal Theory*, London, Routledge & Kegan Paul, 1985, pp. 14-17; "Emerging Issues in Legal Semiotics", *Revue de la Recherche Juridique. Droit Prospectif* (1986-2), pp. 17-37; "Semiotics and the Problem of Interpretation", in this volume, p. 84.

stead, a "coherence" notion of truth is substituted for the "correspondence" variety presupposed by the traditional pattern.

The "weak" objection, on the other hand, does not entail the rejection of truth-conditional semantics or of any correspondence theory of truth. The "weak" version attacks not the relationship between what the witness says and what happened in the past, but rather that between what the legislator said and the facts which later are judged in relation to it. There is now a strong argument from within the analytical philosophy of language itself to conclude that, whatever this relationship is, it should not be described as one of "reference".

I shall explore this latter, "weak" objection in some detail, since I believe that it has not hitherto been noticed. Thereafter, I shall sketch the alternative, "coherence-based" notions which I would wish to substitute, and indicate how the responses to both objections rely - albeit in different ways - upon notions of *narrative coherence*.

I turn first to the "weak" objection, to the place of reference in the normative syllogism. My argument is based upon the famous account of reference given by Strawson.

STRAWSON AND REFERENCE

In his classical discussion of "referring",⁶ the philosopher Strawson uses the example of the sentence (taken from Russell): "the king of France is wise". The expression "the king of France" has meaning whether France is a monarchy or a republic, and - if a monarchy - irrespective of the identity of the monarch presently on the throne. However, the expression "the king of France" will have a particular referent when used in a particular context:

We shall say in this case that you use the expression to *mention* or *refer* to a particular person in the course of using the sentence to talk about him. But obviously in this case, and a great many others, the *expression* ... cannot be said to mention, or refer to, anything, any more than the *sentence* can be said to be true or false. The same expression can have different mentioning-uses, as the same sentence can be used to make statements with different truth-values.

⁶ P.F. Strawson, "On Referring", *Mind* 59 (1950), pp. 320-344, reprinted in G.H.R. Parkinson, *The Theory of Meaning*, Oxford University Press, 1968, pp. 61-85. and in Strawson's *Logico-Linguistic Papers*, London and New York: Methuen, 1971, pp. 1-27.

'Mentioning', or 'referring', is not something an expression does; it is something that someone can use an expression to do.⁷

Strawson's argument regarding the nature of referring would apply equally when the sentence concerned is normative, rather than descriptive; indeed, Strawson seems to have such variants in mind when he distinguishes between a sentence, the use of a sentence, and the utterance of a sentence.⁸ Instead of saying, "the king of France is wise", we might say, "the king of France may levy taxes for the defence of the realm".⁹ Here, we have introduced two variants, while maintaining the element which formed a principal focus of Strawson's discussion, the "uniquely referring expression" - "the king of France". The two variants are the change of modality of the verb, converting the proposition from a descriptive to a normative one ("may" substituted for "is"). The second is the introduction into the predicate of a number of non-uniquely referring expressions, namely: "taxes" and "the defence of the realm". I would argue that these variants are not significant for the purposes of Strawson's analysis. The sentence has a meaning, however abstract or general the presumed circumstances of its enunciation, and even when neither the uniquely nor the non-uniquely referring expressions are used to mention or refer to any particular circumstance. Consider, however, what happens when our normative proposition becomes the major premise in the so-called syllogism, in other words when it becomes the "law" to be "applied" in the court to a certain set of "facts". The question is no longer what I have elsewhere termed a question of meaning (the sense of the word in as abstract a context as one can imagine),¹⁰ but rather a question of adjudication: Are we to regard these words as referring to the facts requiring adjudication? From Strawson's analysis it becomes abundantly clear that it is not the word "taxes" which "refers to" the levy which is in issue in the case, nor is it the words "defence of the realm" which "refer to" the circumstances claimed in the case to justify the act of taxation. Rather, it is the use made of the words "taxes" and "defence of the realm" which (claims to) refer to the particular circumstances.

⁷ 1968: 68, 1971:8.

⁸ 1968: 66-70.

⁹ My example.

¹⁰ *Semiotics and Legal Theory*, *passim*; "Semiotics and the Problem of Interpretation", in this volume, p. 84.

Some may think that this is a distinction without a difference. But the difference becomes abundantly clear when we consider further the apparently less ambiguous (as being "uniquely referring") expression "the king of France", as used in this context. Let us suppose that the legislation which contains this normative proposition is 100 years old. Let us now ask: Whose use are we considering when we talk about the use of this expression as referring to a particular individual? Clearly, it cannot have been the original author, since the present king of France did not exist (even as the twinkle in an eye) at the time of the original enunciation of the law.¹¹ It is surely clear, in this example, that the person using the expression "the king of France" in order to refer to the person who, at the time of litigation, is indeed the king of France, is the person or persons involved in the litigation itself. The fact that the referent of the expression is unlikely to be disputed in no way detracts from this conceptual conclusion. And if this identification of the user of the expression in order to refer to a particular fact is correct in respect of the "uniquely-referring" expression "the king of France", how much more is it true of the non-uniquely referring expressions: "taxes" and "defence of the realm"?

Thus, even from the vantage point of the analytical philosophy of language (Strawson's version) and without indulging in such more radical approaches to the problem of reference as may be found in structural semiotics, we come to the following conclusion. The relationship between the major premise and the minor premise of the normative syllogism raises the question not whether the meaning of the latter is subsumed within the meaning of the former, but rather whether we should (agree to) *use* the major premise as referring to facts contained in the minor premise, or not.

I should add that this is a distinct and independent problem from that of the manner of construction of the minor premise; it is not merely a reformulation of that latter problem. There is, of course, widespread acceptance of the discretionary elements involved in constructing the minor premise, for the purposes of adjudication. Thus, in our present example, there would be widespread recognition of the fact that the classification of the present levy as "taxes" and of the present circumstances as "for the defence of the realm" is itself a pragmatic exercise, taking account of the consequences of such

¹¹ It might be argued that: "the king of France" was used in the original legislation not as a uniquely-referring term in the normal sense, but rather as a term capable of being rendered uniquely-referring by the means of rules of succession contained elsewhere in the Constitution. But such an argument either extends the notion of reference to such an extent as to deprive it of all extension, or requires a theory of denotation (considered below).

classifications in the light of the major premise. But the point I am here arguing, on the basis of Strawson's concept of referring, goes beyond this. Even if we are agreed that the present levy falls within the meaning of "taxes" and that the present circumstances fall within the meaning of "for the defence of the realm", we cannot conclude - on Strawson's account - that the general rule *refers* to the present situation. To make that latter claim, it is necessary that *we* decide to *use* the words of the normative proposition to refer to *these* "taxes" and in *these* "circumstances" of "defence of the realm".

In practice, of course, if we wish to avoid the application of the general rule to the present circumstances, we are more likely to adopt a different strategy: namely to refuse to construct the facts of the minor premise in such a way that they fall within the sense of the words of the major premise. But it is still important to appreciate that, even where it is accepted that the present situation does fall within the sense of the words of the general rule, there is no inevitability - logical, linguistic, psychological or sociological - that it will be decided that the word "taxes" in the general law does indeed "refer to" the present taxes. Why not? Because, as Hart stressed at one stage, legal rules and legal concepts are inherently defeasible: their application, residing as it does in human hands,¹² is always subject to human decision *not* to follow normal semantic constraints. As Kelsen well realized, every act of adjudication involves an act of creative interpretation.¹³ Logic, if applicable at all, belongs to the sphere of doctrine, which involves the relationship between propositions. Adjudication, on the other hand, makes the human activity of reference the master over the purely semantic constraints of sense.

ATTRIBUTION AND REFERENCE: SEARLE V. DONNELLAN

There is, however, a possible counter-argument, to the effect that the terms in the major premise may be said to "refer to" the facts which will later be subsumed within them. I refer(!) to the debate between Searle and Donnellan regarding the distinction between attributive and referential uses of language. The debate is particularly instructive for law in one respect, since it illustrates the use of an institutional means for the (future) identification of a ref-

¹² Rather than computers. See my "On the Tyranny of the Law", *Israel Law Review* 18 (1983), pp. 327-347.

¹³ See B.S. Jackson, "Kelsen between Formalism and Realism", *Liverpool Law Review*, VII (1) (1985), pp. 79-93.

erent. Overall, however, the debate supports the present anti-referential argument, since it shows (a) that even in respect of definite descriptions there is a view in the philosophy of language (that of Donnellan) that such uses are not referential; but (b) even if we accept the view of Searle, that we do here have a referential expression, this hardly rescues the referentiality of the normative syllogism, since the latter only exceptionally employs "definite descriptions".

In the course of an attack on both Russell's and Searle's theories of definite descriptions, Donnellan considers the sentence "Smith's murderer is insane".¹⁴ It may be used in either of two ways: (a) as meaning by "Smith's murderer" not some particular person but, rather, *whoever it was* that murdered Smith; (b) in the context of a courtroom scene where Jones is on trial for the murder of Smith, it might refer specifically to Jones, the man in the dock, who is behaving so strangely. Of these, Donnellan regards only (b) - where we mean a *particular* man, the one we see in front of us - as referential. He terms (a) "attributive".

A crucial feature of the distinction, as Searle points out, is that in the referential uses it doesn't matter if the definite description we use is actually true of the object we are referring to. "Suppose that the man in front of us did not actually murder Smith, suppose no-one murdered Smith but that he committed suicide, still in some sense at least, according to Donnellan, our statement would be true if the man we are referring to is insane. We are simply using the expression to pick out some object, and then going on to say something truly or falsely about it. In the attributive use, on the other hand, if our definite description is true of nothing, our statement cannot be true". Donnellan argues that in the attributive use the speaker is not really *referring* at all. Referring to a "whoever..." is not really referring; one has to have in mind some specific object or person to refer.¹⁵ If we accept this general view of reference, the major premise of the adjudicatory syllogism cannot be referential, since it always refers (because of its prospectivity) to a "whoever...".

¹⁴ Keith S. Donnellan, "Reference and Definite Descriptions", *Philosophical Review* 75 (1966), pp. 281-304. For Searle's response see John R. Searle, *Expression and Meaning*, Cambridge: Cambridge University Press, 1979, ch. 6. See also the response of Alfred F. Mackay, "Mr. Donnellan and Humpty Dumpty on Referring", *Philosophical Review* 77 (1968), pp. 197-202, to which Donnellan replied in "Putting Humpty Dumpty Together Again", *Philosophical Review* 77 (1968), pp. 203-215. See also John Lyons, *Semantics*, Cambridge University Press, 1977, Vol. I, p. 185 f.

¹⁵ *Expression and Meaning*, *supra* n. 14, at p. 141.

Searle accepts that there is an intuitively obvious difference between the two cases, and that this must be accounted for. This difference, he notes, is supported philosophically by the fact that utterances of sentences containing referential uses apparently have different truth conditions from utterances containing attributive uses; moreover, there is syntactical support for making the distinction in that the attributive uses seem to admit the insertion of "whoever" or "whatever" clauses, e.g. "Smith's murderer, whoever he is, is insane", whereas referential uses do not.¹⁶

Searle offers an alternative account, based on his view of reference as analogous to an indirect speech act,¹⁷ according to which both (a) and (b) are referential, though in different ways.¹⁸ The example he gives to attack Don-

¹⁶ *Ibid.*, p. 141.

¹⁷ *Ibid.*, p. 143.

¹⁸ Reference is achieved with a variety of syntactical devices, among them proper names, definite descriptions and pronouns, including demonstrative pronouns (i.e. deictic expressions). "And speakers will be able to use these devices to refer to objects in virtue of standing in certain relations to the objects. For example, a speaker might know the proper name of the object, or he might know some facts about the object, or he might be able to see it in his field of vision, or he might be sitting on top of it, etc ... whenever a speaker refers he must have some linguistic representation of the object ... and this representation will represent the object referred to under some *aspect* or other. An utterance of "Smith's murderer" represents an object under the aspect of being Smith's murderer, "Jones" represents an object under the aspect of being Jones, "that man over there" represents an object under the aspect of being that man over there..." *Ibid.*, p. 142. He distinguishes between referring to something under its primary aspect and referring to something under its secondary aspect: by secondary aspect he means the definite description or other expression which is used by the speaker in an attempt to secure reference to the object which satisfies his primary aspect, the primary aspect containing the truth conditions, the secondary aspect not intended as part of the truth conditions of the statement he is attempting to make. (p. 146).

Applied to Donnellan's example, in cases (a) the reference is to what Searle calls a primary aspect of the referent, in (b) to a secondary aspect. In Donnellan's attributive uses, the expression uttered expresses (only) the primary aspect under which reference is made. Thus the statement made cannot be true if nothing satisfies that aspect, and if one object satisfies that aspect the statement will be true or false depending on whether or not the object that satisfies that aspect has the property ascribed to it. In the attributive cases, in short, speaker meaning and sentence meaning are the same (*ibid.*, pp. 148-149). "According to me all of his cases are cases where the definite description is used to refer. The only difference is that in the so-called referential cases the reference is made under a secondary aspect, and in the so-called attributive cases it is made under a primary aspect. Since every statement containing reference must have a primary aspect, in the 'referential' use the speaker may still have referred to something that satisfies the primary aspect even though the expression uttered, which expresses a secondary aspect, is not true of that object and may not be true of

nellan's claim that the attributive use does not refer at all is that of someone saying in 1960 'The Republican candidate in 1964 will be a Conservative'. This is of particular interest in the present context, since the reason the expression 'The Republican candidate' is attributive and therefore (for Donnellan) non-referential lies in its prospectivity. For Donnellan, there can be no reference here, since there is no particular target which the speaker was aiming for. Searle on the other hand argues that there is a reference to the Republican candidate in 1964, even though we do not know in 1960 which of the candidates will succeed.¹⁹ After 1964, the maker of the prediction could say: 'Yes, I was right way back there in 1960 when I predicted that the Republican candidate in 1964 would be a Conservative, for the Republican candidate in 1964 was indeed a Conservative.' The earlier utterances of "the Republican candidate in 1964", Searle argues, are no more and no less referential than the later ones. In both cases the speaker was referring to the person who is in fact Goldwater, though in 1960 he had no way of knowing that.²⁰

It seems then that for Searle you can 'refer' when the 'reference' is purely formal, in terms of 'whoever will later be seen to satisfy the qualifications in my present linguistic utterance'. But presumably, there is more in it than this. The example of Goldwater surely relies upon the existence of some already established institutional means of identifying who the referent of the linguistic utterance will be. If, for example, in 1964, the *Democratic* party had taken upon itself to nominate the Republican candidate, one could not say that that nominee of the Democratic party was the referent of the statement made in 1960. What Searle must mean is that Goldwater is the referent, *provided* that Goldwater is the person nominated by the procedure which the maker of the statement in 1960 had in mind.

Such a view might have significant implications for the normative syllogism. It provides a possible argument contrary to that derived from Strawson, that legal rules cannot 'refer' to those cases which are later subsumed

not be true of anything. Whether or not the utterance of a sentence to make a statement contains a definite description used as a primary aspect or a secondary aspect depends on the intention of the speaker; that is, it is a matter of the statement he is making and not just of the sentence he utters." (*ibid.*, p. 150)

¹⁹ The primary aspect of the speaker's reference, Searle argues, is expressed by 'Republican candidate in 1964'; he has no other aspects under which he can refer. But these facts do not show that the utterance is not referential.

²⁰ *Ibid.*, p. 151.

within them.²¹ Searle, on the other hand, might say (on the analogy of the American Presidential nomination) that the major premise is referential, in that it refers to whatever cases the courts will hold to be covered by the general rule (i.e. to those instantiating cases which are held institutionally to form possible minor premises within the syllogism). However, it is worth comparing the two examples to see whether the parallel truly holds.

At first sight, one might think that it does not. Searle himself argued that it was possible, after the 1964 Republican Convention, to go back to the original prediction made in 1960, this containing an expression which referred prospectively to what happened in 1964, and to say that statements made about the nominee, before and after, both refer to 'Goldwater', although the identification of Goldwater as that nominee was not known by the speaker in 1960, but was known to the speaker after 1964. Suppose, however, that a court makes a decision qualifying as an instantiating fact within the major premise some fact which no one could possibly have anticipated at the time of the utterance of the major premise, and which seems completely bizarre, from the semantic viewpoint. In other words, we are dealing with cases of Kelsen's authentic interpretation outside the frame.²² The court holds, for example, that an elephant is covered by a rule which uses the expression (refers to) 'birds'. Can one possibly say, in that instance, that the legislator was referring to, *inter alia*, cases of elephants, when it made the statement in the legislation? Obviously not. Yet, as Kelsen would stress, the correct procedures have been used. Therefore, the mere use of a particular set of procedures in order to identify the referent, that referent being given only a formal description in the major premise, would not seem to be sufficient to qualify the instance as a 'referent' of the general rule.

²¹ On the analogy of the presidential nomination, one could say that the major premise of the normative syllogism refers (in Searle's sense), in that the primary aspect is the aspect referred to, since at the time of the legislation, the primary aspect is all one has. This might have to be qualified in the following respect: the primary aspect (the content of the expression in the rule which forms the major premise of the normative syllogism) is all one has in terms of historic facts in the world: all one has is a linguistic proposition of a general character. But one has more than this in a different sense: there are at least core cases - those which (within legislative or doctrinal discourse, but not within adjudicatory discourse) one would regard as falling within the semantic core of the rule, even though these are not historic facts, but propositions which may or may not be instantiated in the future. This feature, however, derives from the fact that the major premise typically uses non-uniquely referring expressions.

²² *Pure Theory of Law*, Berkeley and Los Angeles, University of California Press, 1967, ch. 8, p. 46.

But this, it might be argued, is not sufficient to distinguish the case of the application of law from Searle's argument regarding the Republican nomination. Suppose that the Republican (not the Democratic) convention, using the regular procedures, nominated a horse as the presidential candidate. Ridiculous? Not so. Take a statement made in A.D. 30 about the nominee for consul in A.D. 40. No one could have predicted that Caligula would have nominated a horse. Could one say that the horse was the referent of the statement made in A.D. 30? Surely not. But if not, why not? The correct procedure was used.

The answer must be something like this. Unlike the attribution of formal legal validity, according to Kelsen's model, the attribution of reference does appear to combine aspects of will with aspects of cognition. Searle's own argument in terms of the necessary implication of background assumptions in the construction of literal meaning²³ surely apply equally here. Even though there may be no formal requirement that the person nominated as Republican candidate or as consul be a human being, rather than an animal, the operation of the political institutions concerned adopts just that kind of restriction, as a background assumption. It is precisely the same kind of background assumption as that which Searle elaborates in his purely factual, descriptive example: 'the cat is on the mat'. Just as it may appear completely bizarre, and unnecessary, to state that this statement presupposes the earth's gravitational field, so too it may be completely bizarre and unnecessary - given our background assumptions - to state that a Republican candidate or a Consul must be a human being, rather than an animal.

Some may conclude that this is a relatively minor, and unimportant qualification of the general conclusion which might be derived from Searle's analysis, namely that the general rule does normally refer to the cases which will later be treated as applications of it. There is, however, one other formal difference between the example of the Republican nomination and the example of the application of a general law. The case of the presidential nomination contemplates one specific historic event in the future, which is already partially defined in terms of time and place (or at least time), whereas the case of the general law looks forward to a multiplicity of historic events in the future, none of them defined in any way whatsoever. In other words, the expressions of the major premise are not 'definite descriptions' (or 'uniquely referring expressions'). And not even Searle seeks to apply the notion of reference to indefinite expressions.²⁴

²³ *Expression and Meaning*, *supra* n. 15, ch. 5.

²⁴ See his criticism of Kripke's idea of general intentions, *ibid.*, pp. 155-157.

A definite description is only very rarely the subject of the major premise in the normative syllogism. We do have examples of that. There are whole areas of constitutional law which tell us, for example, what the monarch may or may not do. The arguments between Searle and Donnellan would apply very directly here, so that in Searle's view there would indeed exist a relationship of reference between the general norm and the act of any particular monarch in the future. Donnellan, on the other hand, would not accept even this as a referential use. However, major premises with definite expressions as their subjects are rare. Most of the law concerns classes of people, and uses indefinite expressions in relation to them. And there is nothing in the Searle/Donnellan debate to suggest that an *indefinite* expression can refer to some phenomenon which will later be ascribed the status of an instance of it.

THE THEORY OF DENOTATION

I know of only one possible move which would allow us to perform this trick, but this move is a highly controversial one even amongst linguists. This would be by means of the concept of denotation. Lyons describes the denotation of a lexeme as the relationship that holds between that lexeme and persons, things, places, properties, processes and activities external to the language-system. The term *denotatum* is used for the class of objects, properties, etc., to which the expression correctly applies. For example, the denotatum of 'cow' is a particular class of animals, and the individual animals are its '*denotata*'. But this is not to say that the denoting expression refers to any particular instance of the class, even though the reference of phrases which contain 'cow' may be determined, in part, by the denotation of 'cow'. For example, the phrase 'this cow' may, in some circumstances, be understood by the hearer to mean "the object near us which belongs to the class of objects which the lexeme 'cow' denotes".²⁵

Applying such a view, it might be suggested, the temporal version of the normative syllogism can be rescued from the objections advanced in this paper, in the following way: the major premise *does* establish some correspondence relationship with the outside world - the world which, albeit in the future, will be judged in accordance with it, when the case comes to court - since the meaning of the major premise depends upon our understanding of

²⁵ Lyons, *supra* n. 14, at p. 207.

its correspondence to a class of objects in the outside world, and the process of adjudication consists in ascribing to particular facts the status of an instance of that class.

But any such attempted rescue mission fails on two counts: first, the whole theory of meaning which uses the notion of denotation is highly controversial, and subject to excision by Occam's razor;²⁶ secondly, even if we accept the theory of denotation, it does not help us. As already noted, a distinction is made between a *denotatum* - an instance of the class concerned - and a *referent*. It is only when a case comes to court that such *denotata* can become the *referents* of the minor premise of the syllogism. In short, we can rescue the correspondence theory for the normative syllogism if and only if (i) we can accept the linguistic theory of denotation without endorsing an unacceptable form of essentialism, and (ii) we can accept as sufficient a correspondence not between the words (signs) of the major premise and the facts (referent) of the minor premise, but rather between the *denotata* of the major premise and the *referent* of the minor premise, this latter (unlike the former) being something which can only be identified in the process of adjudication itself. That being so, the problem of prospectivity is not solved; it is merely reformulated.

Lyons points out that denotation holds independently of particular occasions of utterance, while reference is an utterance-bound relation.²⁷ How might this be applied in the context of legal adjudication? It might appear tempting to invoke the Saussurean distinction between *langue* and *parole* to describe the relationship between the major premise (which belongs to an ideal system of legal rules, a language in the abstract) and the actual use of that language in court (which might be regarded as an intelligible *use* or *speech-act* still belonging to the former language, *even though it is not a perfectly-formed instance of the former*). We might then say that the major premise belongs to a sphere of *langue*, and that it denotes while not referring; while the minor premise, when established in court, incorporates an act of reference.

But such an analysis would be erroneous. The major premise itself belongs to a sphere of actual discourse. If the *langue/parole* distinction is useful here, we must apply it to the syllogism as a whole, as encountered in different kinds of discourse: the adjudicatory syllogism, we might say, stands in

²⁶ *Ibid.*, at p. 209 ff., arguing inter alia for the epistemological priority of sense to denotation.

²⁷ *Ibid.* at I, pp. 207-208.

a relation of *parole* to the *langue* represented (according to our taste) by either the legislative syllogism or the doctrinal syllogism. The discourses of legislation and/or doctrine may certainly denote, but they do not refer. As for the adjudicatory syllogism, though this may make use of both denotation and reference, we are no closer to establishing that it is the major premise which refers to the facts of the minor premise. The major premise denotes a class. The minor premise (a) refers to the facts that have (now, in the courtroom process) been legally established, and (b) claims that those facts are a correct application of the class. There is still a major gap in the chain of prospectivity. For even though we may say that the major premise looks forward, by establishing a class within which future events may fall, and even though reference looks backward in pointing to some definitely described phenomenon, the two processes do not establish a single chain. For a *denotatum*, something which falls within the specified class, is not thereby a referent, and a referent is not the same as a *denotatum*. To establish the chain, a judgement has to be made, namely that the referent ought to be regarded as a member of the class, or, as put in (b) above, that the referent is "a correct application of the class". But the notion of correctness need not be purely linguistic, as Lyons himself emphasizes: "If we consider the applicability of a lexeme with respect to the question of whether it is true of the entity to which it is applied, we are concerned with its denotation ... but words may be correctly and incorrectly applied to persons and things, and other features of the external world, for all sorts of reasons, some of which have nothing to do with their denotation."²⁸

If denotation entails the idea that there exists a class of objects, etc, to which an expression *correctly* applies, we also have to determine who - in any particular discourse - is the arbiter of correctness. Obviously, in the context of adjudication, it is not normally the man in the street. Thus, even if we regard legal language, socio-linguistically, as merely a particular "register" of the natural language, we have here a discourse in which the particular register is regulated by its own, very distinct, institutional mechanisms. And if we accept the argument that legal language is a different discourse from everyday language, by virtue of just this institutionalization of the arbiter of correct usage, it follows equally that adjudicatory discourse is different from legislative discourse, since what the judge says to be the meaning attributed

²⁸ *Ibid.*, at p. 213. Cf., now, H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, The Clarendon Press, 1984.

to a word of the legislative discourse (the major premise) counts as the criterion of correctness.²⁹

A further objection to the use of denotation to rescue the normative syllogism is that the theory of denotation appears not to go far enough. It applies first and foremost to "lexemes"³⁰ and it is doubtful whether it can apply to whole sentences. Thus, even though we might say that - in advance of judicial application of any particular general norm - each individual lexeme within that norm has a denotation, a class of objects to which it would correctly (in terms of the conventions of legislative discourse) be applied, such that any instance of that class must equally be regarded as within the sphere of the correct application of the expression, it does not necessarily follow that the sentence as a whole has a correct sphere of application (even in the abstract), such that one can say that particular situations, conceived in the abstract, are correct applications of it.

We are back to the difference between the logic of propositions and the processes of adjudication. If one accepts all the reservations outlined above, it might still just be possible to give an account of doctrinal argument (whether a proposition about abstract situation *x* falls within a proposition concerning a class of abstract propositions *y*), on the basis of the correct usage (denotation) of both the lexemes of the major premise, and the sentence-grammar within which it is embedded. But that is not sufficient in the context of the courtroom. There, a relationship of reference also has to be estab-

²⁹ The claim here made of judicial control over ordinary usage in court is hardly contradicted by either the fact that the legislator, as Hart has pointed out, sometimes uses standards intended to be judged according to the criteria of the ordinary man, or of common sense ("fair", "reasonable", etc.), nor by those occasions when the judge explicitly tells a jury to give a word (e.g. "dishonestly" in the Theft Act 1968) its ordinary meaning, nor even by the paper-rule of statutory interpretation that words of the ordinary language are "ordinarily" to be given their ordinary meaning. In all these instances, the judge is still the master. What the law does is to construct its own version of (permitted) ordinary meaning. Positivists would (indeed must) account for this in terms of a theory of incorporation. Just as morality is not to be counted as an independent source of law, merely by virtue of the fact that a constitution, statute, or indeed judge authorizes its incorporation into the legal system for particular purposes, so too can ordinary language not be regarded as a direct source of legal discourse, since it too operates only within the confines of institutional incorporation.

³⁰ Lyons, p. 208: "In the first instance to lexemes". He goes on to discuss its applicability to predicative and referring expressions, personal and demonstrative pronouns, and descriptive noun phrases, but not to whole sentences.

lished: whether the court (for there is no one else) chooses to *refer* to *this* situation as being a *denotatum* of the major premise.

The notion of denotation as "correct" usage necessarily raises the question, as we have seen, of the identification of the arbiter of correctness. It is quite unrealistic, in my view, to hypostatize this arbiter of correct usage as "the Law" (in general). Even if legislative discourse, the model of the major premise, may legitimately claim to establish meanings universal within a particular sphere of legal discourse, we delude ourselves (at least partially) when we make these same assumptions of the activity of the judge. This delusion is easily understood in terms of the focus of interests of those who are so deluded. While academic lawyers are interested in the particular case *not* for its particularity, but rather - and often only - insofar as it can be regarded as an instance of a more general phenomenon, that does not represent the focus of interest of those engaged in the process of adjudication itself. The interests of counsel concentrate almost exclusively upon the outcome of the particular case; doctrinal considerations are a means to that end. To a large extent, that is true also of the judge in the inferior courts. It is only when we consider judicial activity at the appellate level that we find any genuine conflict in the focus of interest of the judge. He must still resolve the outcome of the particular case, but he must also do so with an eye to the implications of his decision for the legal system in general. He has a conflict of interest - a multiplicity of audiences³¹ - which the legal academic, writing his doctrine, does not share. For this reason, the criteria of correctness cannot be assumed to be the same in these two different contexts. Adjudicatory discourse does not stand to doctrinal discourse as *parole* to *langue*. They are different semiotic systems, with different communications networks, different objects, different codes.

At this point we may recall the account of signification given by Peirce. As Gallie put it, "The characteristic property which Peirce claims to find in every sign-situation is that it is essentially triadic; sign (first term) standing for object (second term) to interpretant (third term). This property obtains, according to Peirce, whether the sign be of the nature of a proposition (or informative sign), an argument (an in greater or lesser degree self-justifying or self-explanatory sign) or of either of two relatively incomplete or indefinite types of sign - the type which logicians refer to as a Term, e.g. a common noun considered without reference to its function in a complete sentence, and the kind of bare indication of an object which is given by the act of

³¹ "Semiotics and the Problem of Interpretation", in this volume, part II.

pointing."³² Meaning, for Peirce, cannot exist in the abstract - merely as a relationship between a sign and an object. It exists only as a *perceived* relation between a sign and an object, the perceiver being termed by Peirce the "interpretant". It follows from this that meaning is not a universal relation between a particular sign and an object (or even a class of objects); it is contingent upon perception. The greater the difference between the contexts in which the perceivers are situated, the greater the difference in the meaning which is likely to be produced.

THE COHERENCE ALTERNATIVE

I turn now to sketch an alternative model of the operation of adjudication, one which seeks to avoid the above objections to the traditional account. I see this account as being based upon relationships of "coherence" rather than "correspondence", and to involve a particular conception of coherence, which is increasingly coming to be called "narrative" coherence. In the course of the argument, I shall try to make the meaning of these terms clear.

In outline, an alternative account would consist in the following claims:

- (a) the major premise itself conceals a narrative form;
- (b) the minor premise is itself constructed as a narrative;
- (c) the relationship between the major premise and the minor premise should be conceived as one of pattern-matching - a question of degree rather than absolutes, of similarities rather than identities.

The major premise conceals narrative structures. Although we increasingly (though it is not an inevitable progression, much less necessarily one of "progress") use abstract terminology to express our general rules of law, this has certainly not been a universal phenomenon in the history of law³³ and there is reason to believe that the understanding of abstract legal propositions and conceptions, even amongst the most sophisticated, is informed by sub-conscious narrative models, of typifications of action, and our reactions to them. I have argued elsewhere that the notion of "collective images" which

³² W.B. Gallie, *Peirce and Pragmatism*, Penguin Books, 1952, pp. 115-116.

³³ A concrete, "casuistic" form, with protasis (containing the conditioning facts) and apodosis (conditioned consequences), not unlike the structure of Kelsen's norm, is typical of ancient and medieval collections of written law. For an interpretation of this phenomenon in terms of cognitive developmental psychology, see my "Historical Aspects of Legal Drafting in the Light of Modern Theories of Cognitive Development", *International Journal of Law and Psychiatry* 3 (1980), pp. 349-369.

George Fletcher uses in his account of criminal law should be understood in this way, and that only by incorporating such understandings can we achieve a true appreciation of underlying tensions in our doctrine - tensions which would not exist if our doctrinal statements meant *only* what they said - or, in other words, if we could apply to them a denotational account of meaning.³⁴

The second proposition is perhaps more familiar. The minor premise, as established in court through the testimony of witnesses, is the construction of a particular narrative - or a competition between alternative narratives. This has been studied from a social scientific viewpoint (whether anthropological, sociological, or psychological is a matter of debate) in the work of Bennett and Feldman.³⁵ I believe that this account is applicable with only minor, and insignificant, modifications, to the processes of fact construction in the civil-law tradition; contrary to the arguments of some, it is not a phenomenon exclusively referable to the "adversary" procedure of common law trials.

Finally and crucially, is the relationship between the implicit narrative of the major premise and the explicit narrative of the minor premise. I do not believe³⁶ that this relationship is itself one of "correspondence". The narrative of the minor premise, as constructed in court (as opposed to some account which may be given of it in a textbook), can never be abstracted *to the same degree* as the model rule (albeit in narrative form) which is used to impose legal meaning on it. The relationship, rather, is one of sufficiency of similarity, a question of degree rather than of kind. Cognitive psychology may be our best current resource for understanding this process. I refer, for example, to the work of Johnson-Laird³⁷ and of Sperber and Wilson.³⁸

"Narrative coherence", however, risks becoming a slogan. It is necessary to specify far more clearly what is meant by narrative, in what different ways it operates, and what functions it performs. I suggest that any clear understanding requires us to make two types of distinction: first, in relation to the

³⁴ "Narrative Models in Legal Semiotics", in *Narrative in Culture*, ed. C. Nash, London, etc.: Routledge and Kegan Paul, forthcoming.

³⁵ See further B.S. Jackson, "The Narrative Model of the Trial: Semiotics and Social Psychology", *European Yearbook for the Sociology of Law* (1988).

³⁶ As suggested by some participants at the Florence symposium.

³⁷ *Mental Models*, Cambridge University Press, 1983.

³⁸ *Relevance*, Blackwell, 1986.

nature of the discursive phenomenon to which the model is applied; secondly, in relation to the function to which we attribute narrative coherence - particularly, whether we are using it as a descriptive model, or whether - as some have done (but not, to my mind, satisfactorily) - we see it as an alternative form of justification of legal decisions.³⁹

Narrative structures are involved in courtroom adjudication at a number of different levels. We may briefly distinguish these as follows.⁴⁰

First, narrative structures inform the manner in which witnesses tell their stories. This is not merely a matter of the content of the story, but rather the way in which it is told. Events may be brought out in testimony in a sequence different from that in which they are claimed to have occurred. Advocates are aware of this issue of sequencing. For example, Marcus Stone notes that though intelligibility, and therefore plausibility, are normally enhanced by telling the story in the same sequence as the events are claimed to have occurred, there may be reasons in particular cases to override this normal sequence, for strategic reasons.⁴¹ Narrative structures as manifest in the telling of stories have been studied by story grammarians in psychology.⁴² Indeed, some (but not all) story grammarians insist that the theory of story grammar is applicable primarily to this level of text, rather than to the content of the story which is told.

Secondly, narrative structures inform the content of the story which is told. Another group of story grammarians in psychology focus upon the narrative coherence of the content of the story. This seems to be the level with which Bennett and Feldman are most concerned, in their analysis of the construction of plausibility in jury trials. Plausibility is here a matter of the internal coherence of the narrative. We may divide this notion into two re-

³⁹ Justification is a discourse of its own. Narrative can certainly be used in it, but where this is done, the narrative of the minor premise is arbitrarily cut down to a level of abstraction where a correspondence relationship may, indeed, be established with the underlying narrative of the major premise. This process, however, can only be achieved at the cost of arbitrary excision of particularities of the case which may well be relevant for decision-making but not for justificatory (quasi-doctrinal) discourse. In other words, a different narrative again is created for the purposes of justification.

⁴⁰ See my article cited above, note 35.

⁴¹ Marcus Stone, *Proof of Facts in Criminal Trials*, Edinburgh, W. Green & Son Ltd., 1984, p. 269.

⁴² See my article cited above, note 35.

lated aspects: internal and external. Internal narrative coherence can be conceived primarily in quasi-logical terms. Are the various parts of the story consistent with one another, or do they manifest contradiction

There is also an external aspect of narrative coherence, which involves comparison of the content of the story told by the witness with other stories which form the stock of social knowledge of the jury. A story will appear plausible to the extent that it manifests similarity with some model of narrative which exists within the stock of social knowledge of the jury. It is this notion of narrative coherence - the similarity of the story told with the social knowledge of the audience, the latter itself constructed in narrative terms - that is at the centre of "narrative coherence" as an alternative to "factual correspondence" in the model I am proposing of truth-construction in the court. With some refinements, this is the model proposed by Bennett and Feldman.

Third, the relationship between the major premise and the minor premise of the syllogism - the application of "law" to "fact" - is conceived in a similar manner. But whereas in the process of fact construction, the narrative as told in the court is compared to the jury's stock of socially-constructed narrative models, here that same narrative construction of fact is compared with the narrative model underlying the (often conceptually expressed) rule of law to be applied. In theory, of course, these two processes are entirely distinct. Where we have jury trials, we might very well justify the implication of *social* models in fact-construction (since fact-construction, certainly where we use a jury, involves judgements of everyday experience), while law-construction may be regarded as an entirely artificial creation, the product of decisions made within institutions. That, at least, is the theory underlying our traditional distinction between law and fact. But even where fact and law are institutionally separated in the courtroom process, through the use of a jury, the account here given indicates that the social dimension of knowledge-construction intrudes even into the technical process of application of law. For if the comparison is being made not between facts and a conceptually-expressed rule (albeit one which incorporates a model set of facts as necessary conditions for the application of that rule), but between a narrative construction of facts and the narrative model underlying the conceptual statement of the rule, that latter underlying narrative model cannot be entirely accounted for by the institutional processes of the creation of positive law. The collective images which, as Fletcher has suggested, underlie the development of English Criminal Law are precisely that - collective images, not the products of either legislative or judicial fiat.

Fourth, the Greimasian school of semiotics suggests that there exists a deep, semio-narrative level, which is implicated in the process of construct-

ing *any* signification: part and parcel of the process of making sense. To the semiotician, perhaps, this alone is capable of providing us with an epistemology. We know only what makes sense, and what makes sense manifests, at the deep structural level, a narrative pattern. I have discussed this at some length elsewhere;⁴³ no more need be said about it for the purposes of the present argument.

All the forms of narrative structure outlined above relate to the process of communication and decision-making in the court. But these processes do not give us a complete account of legal adjudication, and it may be as well to conclude by noting other areas which also need to be taken into account. These other areas are also, in my view, illuminated by notions of narrative coherence. But they are illuminated in different ways, which can - at best - only be sketched in the present paper.

Some of these processes take place before a case comes to court. We have been considering the position of a witness giving testimony in court. The witness is there engaged in an act of persuasion.⁴⁴ But before the witness get to the stage of seeking to persuade anyone of a particular version of thing, he/she must first of all have perceived those facts, secondly must have stored those facts in memory, and third must have (even if virtually simultaneously with the process of communication of those facts) have retrieved them from memory. These three processes - perception, memorization, retrieval - are phenomena studied by psychologists, and in all of them it has been suggested that narrative models are involved. In our account of the trial process, we should not exclude what goes on in the mind of the witness before the act of communication.

We must also consider what occurs after the decision is taken, in the communicational process engaged in by the judge. In common-law jurisdictions at least, we are able to separate the making of the decision from the justification of that decision, since frequently decisions are announced and effect given to them, while judgement (with its justifications) is reserved to be published later. The discourse which justifies a decision is conceptually distinct from the reasoning processes (some of them subconscious) which make up the process of decision-making itself. Justificatory discourse is itself a separate discourse, in which explicit versions of the narratives concerned (those of fact and law) are given, and - often - a deductive relationship

⁴³ *Semiotics and Legal Theory*, *supra* n. 5, Pt. II.

⁴⁴ To be understood in the context of the Greimasian "polemic" semio-narrative structure, whether we are dealing with the explicitly "adversarial" common-law trial process or the apparently non-polemic inquisitorial trial process of the civil law.

is claimed to exist between them. It is interesting to compare the common-law and civilian texts which communicate such justification. The civil-law judgements often express the justification very much in syllogistic form. Common-law judgements, on the other hand, are much more "discursive". This is not the occasion to explore the implications of that difference. But it is at this level - the special discourse of justification rather than the process of decision-making - that the more significant differences between the two families of legal system are likely to be found.

LEGAL CERTAINTY, COHERENCE AND CONSENSUS: VARIATIONS ON A THEME BY MACCORMICK

LETIZIA GIANFORMAGGIO

I. INTRODUCTION

1. Solving a legal problem and deciding a case or a dispute on the basis of law are obviously not the same thing. Let us assume that the jurist is the person who puts legal problems (or puts them to himself) and possibly solves them, and the judge the person before whom cases are brought and disputes presented for decision (= he has to decide) on the basis of law. This means that a legal problem may not have a solution or (the same thing in other words) may have more than one solution; while a case or legal dispute has to have one decision, and one only.

Let us assume that law is *the text* through which the problems that the jurist is competent to solve are raised; and that outside the text there is *the world* where events take place and actions are carried out that become cases and disputes that the judge is called on to decide upon. This means that, though a case in the world is something quite different from a text problem, a case may figuratively, by metonymy, be said to be a legal problem; which in reality means a problematic case from the viewpoint of law, or a case whose decision does not derive, i.e. is not uniquely and unambiguously extractable, from the text, or from the text worked on by the jurist.

A legal problem is not one which, even simply in principle, admits of one solution and one only. On the other hand, a decision has to be taken on a case or on a legal dispute.¹

¹ The distinction this article draws between jurist and judge leaves out a third type of legal practitioner, in no way less significant: the advocate. I do not, however, attribute special characteristics here to the advocate; this is not by chance. I in fact consider, by contrast with what one often reads, that, from the viewpoint of legal justification adopted in this article, the advocate does not take on any autonomous shape. As was recently well written: "The advocate ... acts by selecting, among the possibilities offered by positive law, the one most favourable to the interests of his client. The advocate is, then, not fully a jurist ...:

2. This situation confronts the judge with special problems of method, carefully and acutely analyzed in the current theory of legal argumentation, which has to be regarded, much more than as a branch or section of legal philosophy, as a way of doing philosophy of law.²

It is, I believe, founded on the assumption - ideological, if you will - or value of *certainty*,³ which from the viewpoint of a sociology of legal science and/or theory may also be regarded, being a shared value, as a fact that conditions the production and acceptance of theory. A naive sociology of knowledge, of "reflection", might say that the theory of legal reasoning as we know it merges and is accepted where, and when, certainty, in the sense of predictability and verifiability of decisions of justice, is assumed as an infeasible value. The two fundamental components of legal argumentation, *reason* and *law*, are in fact understood as limiting conditions on what may justly be decided.

But in order for the decision, the sole decision that has to count as such, to be totally predictable and verifiable it must (=can only) be the sole possible outcome of a procedure, the obligatory end of a road that could have been anticipated and can be gone over again.

It is well known that there is only one procedure, one road, made in this way, namely deduction from sure premises. The role that deduction plays, can play, or ought or ought not to play in legal reasoning is a classical,

instead, the characteristics of the jurist would seem to be assumed by the adversary pair of lawyers, who professionally personify the 'pro' and 'contra' that the individual jurist ought to debate within himself ... This description is not intended as a reductive image of the figure of the advocate: he in any case is not - must not be - a judge ... But his half-justice ... is nevertheless indispensable to the formation of the 'whole' justice that must apply in the actual case; that is to judging, the activity that transforms the static formal validity of the norm into living efficacy." (G. Così, "l'Avvocato e il suo cliente. Appunti storici e sociologici sulla professione legale," in *Materiali per una storia della cultura giuridica*", 1986/1, pp. 3-73, pp. 65-66).

² See: A. Aamio, R. Alexy, A. Peczenik, "The Foundation of Legal Reasoning," in *Rechtstheorie*, 12, 1981, pp. 133-158, 257-279, 423-448; republished under the title *Grundlagen der juristischer Argumentation*, Berlin, Duncker und Humblot, 1983, pp. 9-87.

³ This emerges with particular clarity in the works of A. Aamio; see esp. *The Rational as Reasonable. A Treatise on Legal Justification*, Dordrecht, Reidel, 1987. On the topic of certainty cf. L. Gianformaggio, "Certeza del diritto", in *idem, Studi sulla giustificazione giuridica*, Turin, Giappichelli, 1986, pp. 155-169.

much-discussed theme.⁴ A less-discussed theme is that of the *sure* premises taken as a basis for inductive inference, and its role in legal reasoning.⁵ Below I shall deal with both, and propose outlines of theses to be understood as simply variations on the theme of normative and narrative coherence, as worked out by Neil MacCormick in an article which is already justly famous.⁶ I must make it clear at once, however, that the thoughts I shall present below are based in particular on the legal experience specific to systems of *civil law* and the relevant theory. This difference from MacCormick's approach will prove significant particularly in connection with narrative coherence, i. e. in relation to the theme of proof.

MacCormick has proposed two distinctions that seem to me fundamental: between *consistency* and *coherence*,⁷ and between *strong* and *weak derivability*.⁸ I think that it is possible to link the two distinctions with each other better, and I shall seek to do so by changing the terminology in the following manner: I shall not speak of *coherence* in contrast with *consistency*, but shall understand coherence as, generically, the "hanging together", as property of a system, of a whole, of a unit; and I shall regard it as a genus with

⁴ Recently rejuvenated by the lively discussions that stances regarding Kelsen's last and posthumous works aroused. Cf. L. Gianformaggio, *In difesa del sillogismo pratico, ovvero alcuni argomenti kelseniani alla prova*, Milan Giuffrè, 1987.

⁵ But see N. MacCormick, "Universalization and Induction in Law", paper delivered at the conference *Reason in Law*, Bologna 1985; L. Gianformaggio, "Modelli di ragionamento giuridico. Modello deduttivo, modello induttivo, modello retorico, e analogia", in *idem*, *Studi sulla giustificazione...*, *op. cit.*, pp. 33-56, and pp. 131-154.

⁶ Cf. N. MacCormick, "Coherence in Legal Justification", in A. Peczenik, L. Lindahl, B. van Roermund (eds.), *Theory of Legal Science*, Dordrecht, Reidel, 1984, pp. 235-251; republished with changes, in W. Krawietz, H. Schelsky, G. Winkler, A. Schramm (eds.), *Theorie der Normen. Festgabe für Ota Weinberger zum 65. Geburtstag*, Berlin, Duncker und Humblot, 1984, pp. 37-53. Below I shall quote from the second, more elaborate version.

⁷ Reiterating what he had said in previous works, MacCormick writes: "I interpret consistency as being satisfied by non-contradiction. A set of propositions is mutually consistent if each can without contradiction be asserted in conjunction with every other and with their conjunction ... By contrast, coherence, as I said, is the property of a set of propositions which, taken together, 'makes sense' in its entirety." (*op. ult. cit.*, p. 38)

⁸ "... the constraint of coherence seems to be treated by lawyers as a relatively weak constraint, perhaps because it determines only what we might call the 'weak derivability' of a ruling or decision from the pre-existing law. This contrasts with 'strong derivability' where some ruling or decision is deductively derivable from binding rules of the system, in the sense that any other decision would be directly inconsistent with (or contradictory of) some such binding rule" (*op. ult. cit.*, p. 47).

three species, namely *consistency*, *compatibility* and *congruity*. Furthermore, I shall set beside *coherence*, as means of justification, *correspondence* and *consensus*.

3. The problem of certainty in argumentation whose conclusion is a legal decision is the problem of external, or second-level, justification of a decision.⁹

Certainty here does not mean "truth", nor "obviousness", nor "subjective conviction". It means "correct assumption".

Premises are certain if correctly assumed; assumed, that is, not by chance or by pursuing paths and processes that can be taken only by the judge, being known only to him, or perhaps not even to him, being unconscious.

Rational premises are certain, according to a procedural conception of rationality.¹⁰ At the limit, the valid norm as major premise and the true factual statement as minor premise. But this is solely a limiting case.

We have in fact lost the trusting, rather naive optimism of those who intended to fill the codes - coherent and complete laws - with few, simple and clear rules of reason. As for the conception of truth as correspondence, which in my view cannot be abandoned, it now generally goes hand in hand with a very important distinction, namely between the definition of truth and criteria for recognizing it, which involves the recognition that some truths may be beyond cognitive capacity.¹¹

If, then, the valid norm and the true factual assertion sometimes impose themselves, other times - and frequently - they are instead the laboriously secured conclusions of complex procedures of argumentation which taken together constitute the external justification for the decision, i.e. the justification of its premises.

In such cases, does "sure premise" still mean something? I think it does, and I also think that believing it does is the same thing as believing in the specificity of the legal dimension, in something distinct about law that

⁹ Cf. J. Wroblewski, "Legal Syllogism and the Rationality of Judicial Decision", in *Rechtstheorie*, 4, 1974, pp. 33-46; and N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford, Clarendon, 1978.

¹⁰ Cf. R. Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Frankfurt, Suhrkamp, 1978.

¹¹ Cf. I. Niiniluoto, "Truth and Legal Norms", in N. MacCormick, S. Panan, L. Lombardi Vallauri (eds.), "Conditions of Validity and Cognition in Modern Legal Thoughts", in *ARSP*, Beiheft n. 25, pp. 168-190.

makes it irreducible to factuality on the one hand or to arbitrariness of decision on the other. This does not mean about law as it is (as phenomenon), obviously; that, as we all know very well, is often mere factuality and often mere arbitrariness. But nor is it merely about law as it ought to be (as ideal); for in that case we would have to ask: "according to whom?". It is about law as a concept; an abstraction, yes, but with meaning within a theory of social practice, as self-representation of a culture.

In this concept, *coherence* is an essential element.¹² And here is how certainty leads us to *coherence*: What it does it mean - given, as I have said, that it does mean something - for the premises of legal argumentation to be certain? My answer, and I hope it does not seem too banal, is that it means that the judge will have done a good job, will have scrutinized both *text* and *world* with such acuity, and then processed the data in his possession with such care and arranged them in such a coherent framework that, if one goes over his route from beginning to end, one has to say: "certainly, it cannot be any other way!". Certainty is, then, always relative, and can be recognized only *a posteriori*. Below I shall analyze the various forms that *coherence* takes on and the various ways in which it produces justification and certainty.

Here is a brief preview of the conclusions:

1. When in legal argumentation the need emerges to justify a norm or factual assertion, what is sure to justify it is *consistency*, a term whereby I mean (differently, perhaps,¹³ from MacCormick) deducibility from norms taken as certainly valid or from sure facts (which in this case I shall call proofs), i. e. its strong derivability;
2. When *consistency* is not of assistance, the first step to be taken is one of recourse to *compatibility*, whereby I mean non-contradictoriness with norms taken to be certainly valid or with sure facts (which in this case I shall call evidence), i.e. MacCormick's *weak derivability* (and, perhaps,¹⁴ his *consis-*

¹² On coherence as a "legal virtue", cf. N. Bobbio, "Formalismo giuridico e formalismo etico", in *idem*, *Studi sulla teoria generale del diritto*, Turin, Giappichelli, 1955, pp. 149 ff. On coherence as an instrument of certainty cf. *idem*, *Teoria dell'ordinamento giuridico*, Turin, Giappichelli, 1960, pp. 119-124.

¹³ This caution is justified by one possible interpretation of the passage cited in Note 8 above, which might possibly be understood in the sense of identifying *consistency* and *strong derivability*. It is, in short, not entirely clear whether MacCormick distinguishes between deductiveness and mere non-contradictoriness.

¹⁴ Cf. Note 13 above.

tency): this second form of *coherence*, namely *compatibility*, is, however, by definition unable to justify one single solution, i.e. the decision; so that

3. When *consistency* is not of assistance the second step to be taken is that of recourse to *congruity* or rational adequacy (MacCormick's *coherence*), which is made necessary in order to justify the choice of decision among various mutually incompatible solutions, *compatible* with norms or sure facts. Finally, and this is the central point I will seek to maintain, an analysis of how and why *congruity* justifies will lead me to identify and emphasize, as a further and final instrument of justification, *consensus*.

II. THE TEXT

4. To begin with, let us state the problem of the *certain norm*, i.e. the problem of external justification of the major premise of a legal argument, in the strict sense of final syllogism arriving at decision.

I wish once more to stress the most important thing: the judge, operating within a culture that regards his decision as the outcome of legal reasoning, has always the burden of showing that what I shall henceforth call a rule of decision, i.e. the norm taken by him as major premise, i.e. the norm he applies, is the *certain norm*, i.e. the norm of law. This is always so, and therefore even when identifying it is troublesome, i.e. requires argument.

I have used the term "identify" deliberately, and only because I have not found any other even more generic or vaguer term, so as to clearly cover both the situations that have constituted the object of eternal, needless dispute between formalists and anti-formalists: the dispute as to whether the judge *finds* or *posits* this norm.¹⁵ This question, if it is not ideological nor to be understood as a question of sociology of knowledge and/or of the legal profession, can be understood solely as a logical question, in my opinion admitting only one answer, which is a correct but banal one. It is that what is presented as the conclusion of a formally valid, i.e. deductive, argument that can stand up to verification is to be regarded as found in the premises; while, in the fields of argument¹⁶ in which the possibility of both verification and falsification is excluded in principle, any conclusion of

¹⁵ According to the meaning of 'legal formalism', "most frequent in polemic usage, hence better known" (M. Bobbio, "Formalismo giuridico", *idem, Giusnaturalismo e positivismo giuridico* Milan, Comunità, 1965, p. 93).

¹⁶ On the notion of "field of argument" cf. S. Toulmin, *The Uses of Argument*, London, Cambridge Univ. Press, 1958.

amplifying, i.e. not formally valid, inference is to be termed *posited*. That is all there is to be said.

Identifying the certain norm is a problem of interpretation, a legal problem, and therefore a problem of the *text*. The judge, too, in this stage of his work, is therefore operating as a jurist, since what he scrutinizes is the *text*, not the *world*. He scrutinizes the text to disclose all its potentialities, both in the sense of making explicit what is in it and in that of disclosing all the additions that the text admits, without becoming denatured thereby;¹⁷ but with one important difference from the jurist, namely that he has to respond to the problem posed to him by the text with one solution and one only.

The important and indeed in principle essential difference is nevertheless not too significant in practice, in which there no longer exists, if there ever did, a jurist who does not scrutinize the *text* in the light of what happens in the *world* and with a view to finding which portion of *text* contains or suggests the decision on a case in the *world*. Not the case *C*₁ that the judge has in front of him, but any case *C*, i.e. a type *C* of cases that has all the relevant characteristics of case *C*₁. A problem of interpretation is always also at the same time a problem of qualification and is always the preliminary stage of a subsumption.

The law is never interpreted to say, as Kelsen wanted jurists to say, everything it means, i.e. contains or admits.¹⁸ Always, a problem of inter-

¹⁷ If I understand it rightly, the use made by Riccardo Guastini of the term "implicit norm" ignores this difference. Cf. R. Guastini, *Lezioni sul linguaggio giuridico*, Turin, Giappichelli, 1985, p. 134: "an implicit norm is accepted within a normative system if it can be derived – through some logical, semi-logical or pseudo-logical procedure – from norms already accepted ... Supplementing the law is the activity of manipulating a whole made up of provisions and/or explicit norms, so as to derive (other) implicit norms that allow lacunae to be filled". It seems to me that merely by definition, i.e. given the meaning of terms that can be derived from their use, it may be said that there is in the text a lacuna to be filled wherever what is being sought is not implicit in the text. The theories of "textual co-operation" and of the "reader as textual strategy" do not deny but in fact presuppose that there is a meaning in speaking of "fidelity" to the text, however complicated this concept may be: otherwise there would be no meaning to distinguishing different levels of textual co-operation. Cf. U. Eco, *Lector in fabula*, Milan, Bompiani, 1979, p. 79: "The text does not trouble to say that they are married to each other, but no reasonable reader will doubt this. The author knew that the text could allow itself that piece of laziness on the basis of an extremely hyper-codified stylistic rule. If the author had wished to say they were married to different people he would have got round the effect of that rule by using redundant expressions." But citations might be multiplied.

Returning to our field, it does make a difference whether the procedure of justifying a rule of decision is logical or pseudo-logical (I do not know what semi-logical means), and neglecting this seems to me to amount to indifference towards the value of legal certainty.

¹⁸ Cf. H. Kelsen, *Reine Rechtslehre*, Vienna, Deuticke, 1960, Chap. VIII.

pretation is to establish what the type of case C is, and what treatment it deserves from the law, or - and this is the same thing - what case C₁ is (and likewise C₂, C₃ ... C_n), as being cases of type C.

The jurist may, by contrast with the judge, conclude that the solution is doubtful; as we know, this way out is precluded to the judge. What for the jurist is a problem with a doubtful solution is for the judge a "hard case": but this will be the initial, not the final, statement in his work, i.e. in his argumentative efforts.

5. The certain norm, I have said, is that of law. But the interpreter (whether judge or jurist, no difference being made here) may present it as indisputable, through merely mentioning, textually citing or paraphrasing a normative provision; meaning thereby to level the whole decision down to valid law. I shall not say that whenever he does this the interpreter obscures a logically necessary stage in his procedure, namely the one consisting in deriving a norm from a provision. The totally obvious statement that every normative text abstractly admits of more than one interpretation is entirely irrelevant here. What is of interest here is not what is abstractly admissible, but the specificity of an operation carried out within a particular legal culture, and it is only within that culture that it will have meaning to discuss and assess whether and to what extent the interpreter has obscured the argumentative line that he knows the justification required of him must consist in.

In any case, there is a rule on the burden of the argumentation which I might call an "economy principle", according to which the justification is given only when requested (by which is meant, in the context in which it has to do its job¹⁹).

Other times, between what is assumed to be recognized as valid law and the rule of decision, there is assumed to be a *gap*, and this is the locus of external justification. The width of the gap may vary, even quite considerably; it is in direct proportion to that width that the "difficulty" of a case is measured.

I am interested at this point in distinguishing between two types of gap which I shall, provisionally, call "minimum gap" and "maximum gap", in

¹⁹ Cf. R. Alexy, *Theorie...*, *op. cit.*, p. 224: "Wer ein Argument eingeführt hat, ist nur bei einem Gegenargument zu weiteren Argumenten verpflichtet".

any case intending to express also, and chiefly, a distinction of quality and not of degree.²⁰

There is a "minimum gap" between valid law and the rule of decision, i.e. between the two ends, poles, of external normative justification, whenever in order to fill it a rule is produced for the passage from one pole to another which is presented as a rule for replacing the first of them by the second. In this case and in this way, justificatory argumentation is presented as deduction from sure premises; and its conclusion, i. e. the rule of decision, is presented as the one that is in the law, the only one that the law admits, because, even though not explicitly, it contains it. The rule of decision is thus presented as a norm of law implicit in the text.

The case of "minimum gap" is, then, the one in which *consistency*, or deducibility, justifies externally too, that is, in which external justification too is (presented as) a demonstration; and the premises are either explicit rules of law,²¹ or, for instance, a rule and a metarule, such as an accepted criterion of legal interpretation, not supposed to be in conflict, at least as far as that rule is concerned, with different accepted criteria.²² It may, strictly speaking, be said of implicit norms in this technical sense of implied by explicit, or at least assumed to be accepted, rules of law, that they are those *found* in the law by the interpreter; on the condition, however, of not intending thereby to postulate, under the logical camouflage of the discourse pursued thus far, any legal ontology.

²⁰ A relationship might possibly be set up between my notion of (minimum and maximum) "gap" and the notion of "*jump*", theorized by Aleksander Peczenik. The minimum gap would be the *jump*, once rendered deductive through the addition of an appropriate role of inference accepted as a *topos* by the hearers. The maximum gap would instead be transformation as such.

²¹ As in the case of "derived obligation". Cf. C.E. Alchourron and E. Bulygin, "The Expressive Conception of Norms", in R. Hilpinen (ed.), *New Studies in Deontic Logic*, Dordrecht, Reidel, 1981, pp. 102-103 "... the notion of derived obligation is related to the notion of implicit command ... If a person commands something, he also commands all the consequences of what he has explicitly commanded (even if he is not aware of them). For instance, if a teacher commands that all his pupils should leave the class-room, he also implicitly commands that John (who is one of the pupils) should leave the class-room, even if he is not aware of the fact that John is there".

²² Cf. H. Kelsen, *Allgemeine Theorie der Normen*, Vienna, Manzsche Verlag und Universitätsbuchhandlung, 1979, p. 201. Kelsen adduces as example the two norms (1) "People ought not to cause one another harm" and (2) "People ought not to slander one another", and writes: "The general norm (2) is in fact *implied* in general norm (1), and can be made *explicit* through interpretation ... norm (2) does not lay down anything not already laid down in norm (1)" (my italics).

6. The rules *found* by the interpreter are customarily counterposed to those *posited* in the course of a procedure which is, or was, termed *supplementation*, distinguished from *interpretation* proper.²³

If we free ourselves of the ontological presuppositions of this mode of expressing ourselves, the logical residue is the same idea as what I have called "maximum gap"; that is, as follows.

Sometimes the rule of decision is presented not as the sole correct conclusion that the logical procedure of external justification draws from valid law; but as one of the possible conclusions, that taken to be the best. The reason for this may be that the premises taken as valid law are not (taken to be) indisputable, because valid law might (it is admitted) supply others from which a different rule of decision would have to be drawn. Or the reason might be that the premises taken *are* indisputable and do admit (i.e. tolerate, permit) that conclusion, yet do not impose it.

The two cases are in fact not very dissimilar, and the first may often be reduced to the second. The fact that the premises of external justification are not indisputable may mean either that they have been assumed without being the obligatory conclusions of a further procedure of justification; or that the premises of the further procedure of justification of which they are the obligatory conclusion have not themselves been assumed because they are indisputable. And so on.

But in this case, i.e. in the case of the "maximum gap" where *consistency* cannot justify, does it still have meaning to say that *coherence* is still that which justifies?

I think that as an answer to the problem of external justification this is undoubtedly correct, though still a little too generic and requiring further clarification. In fact, here, the *coherence* that justifies can only be *compatibility*, i.e. the non-incompatibility or absence of contradiction with the premises of the justification;²⁴ but *coherence* in this sense of *compatibility*

²³ Cf. M.S. Giannini, *L'interpretazione dell'atto amministrativo e la teoria generale dell'interpretazione*, Milan, Giuffrè, 1939, p. 87: "Supplementation is the operation of seeking a legal proposition in order to complete an insufficiently formulated or manifested intent ... This is the fundamental difference from interpretation, which consists in understanding the legal scope of an intent."

²⁴ Cf. M. Bobbio, *Teoria dell'ordinamento giuridico*, *op. cit.*, pp. 74-82 on the various meanings of "legal system". In particular, compare the first meaning (deductive system) and the third (exclusion of incompatibilities), in connection with which Bobbio writes: "Note that saying that norms must be compatible does not mean that they imply each other, i.e. constitute a perfect deductive system. In this third sense of system, the legal system is not a

justifies, by definition, not one only but more than one rule of decision. It is here, then, that the distinction between judge and jurist as interpreters, with which we opened this article, takes on all its importance: *compatibility* does justify the interpretive *conclusions* of the second, but not the interpretive *conclusion* of the first.

I have already said that according to me the difference is much more meaningful in principle than it is in the actual practice of legal science or dogmatics. This is because, in practice, legal science comes much closer than the principle of *pure* scientific research would require to the method and objective of judicial interpretation, which is that of identifying the best interpretive solution allowed by valid law, i.e. the best solution among those *compatible* with valid law.

This species of *coherence*, then, *compatibility*, might justify the outcome of the jurist's interpretive research, but only in those cases (in my view unlikely) in which the jurist were to regard his task as completed once all the available possibilities for solving the legal problem posed were identified.

Here *compatibility* could never justify the rule of decision posited by the judge; this is so simply by definition, since if the sole conclusion later taken as rule of decision were justified, we would in fact have a case of the other special form of *coherence*, namely *consistency*.

7. In fact, where *consistency* is not of assistance, the judge takes as rule of decision the best rule *compatible* with valid law. That here *best* means *justest* is beyond discussion. But this statement does not advance logical research very much, since the problem is how to justify the choice, the favouring of that rule, i.e. what it signifies and what it logically involves to assume that a rule is just.

It may, I think, mean two different things, and involve two at least partly different logical procedures of justification. The two different things are what our legal tradition termed *auto-supplementation* and *hetero-supplementation* of law;²⁵ in a terminology which, let us face it, is more suggestive than indicative, but certainly not without meaning. From a logical point of view I have already distinguished, even if in metaphorical language, between supplementation and interpretation in terms of "maximum gap" and "minimum

deductive system, as it is in the first sense: it is a system in a less pregnant sense, if you will a negative sense, i.e. an order that excludes the incompatibility of its individual parts."

²⁵ Cf. F. Camelutti, *Teoria generale del diritto*, Rome, Foro italiano ed., 1940, pp. 144-155.

gap". What now remains to be seen is where, in the case of the "maximum gap", the criterion is derived from to choose one among the rules *compatible* with law.

The tradition that has supplied the categories of auto-supplementation and hetero-supplementation suggests to us the beginnings of an answer: in the case of "maximum gap" the criterion of choice may be derived from within or from outside the law.

From inside the law means from *ratio*, or from the deep *Zusammenhang* of law; it means following that typically legal procedure that jurists of the early modern period said was based on the assumption of the *analogia juris*, i.e. of the rational system of law.²⁶ This seems to me to be the meaning (not at all new) of *coherence* as understood by MacCormick (as also, in its most relevant aspects, of Dworkin's *integrity*, which I would not regard as a particularly original concept²⁷): *analogia juris*.²⁸ I shall call it *congruity*.

Congruity in this sense is the property of a normative conclusion, and the appeal to *congruity* is a procedure of justification; but *congruity* is also the property of the system of premises (or of the system within which the premises are selected) of the argumentation that generates that normative conclusion. That conclusion, then, is one only.

A *congruous* system is not a deductive system, but it is not merely a system without contradictions either. *Congruity* is not *consistency*, but it is not mere *compatibility* either. It is less than the former, but more than the latter. It is the "story as meaning of the text" of the hermeneutic tradition. This tradition makes very deliberate use of the concept of analogy in the legal tradition²⁹: of analogy understood in Aristotelian terms as proportionality (later it will also be called harmony) which is a quite different procedure from the Aristotelian *paradigma* or *argumentum ab exemplo*.³⁰

²⁶ Cf. J. Falk, *Die Analogie im Recht. Eine Studie zur neueren Rechtsgeschichte*, Mainz, 1906; and N. Bobbio, *L'analogia nella logica del diritto*, Turin, Artigianelli, 1938.

²⁷ Cf. R. Dworkin, *Law's Empire*, London, Fontana Press, 1986, chaps. 6 and 7.

²⁸ It is significant in this connection that MacCormick does not find important differences between procedure by analogy and recourse to general principles of law: cf. N. MacCormick, *Legal Reasoning...*, *op. cit.*, chap. VII.

²⁹ Cf. G. Zaccaria, *L'ermeneutica*, paper presented to the XVI Congresso Nazionale di Filosofia del diritto, Padova, 1986, to be published shortly.

³⁰ Cf. L. Gianformaggio, *Analogia*, *op. cit.* By contrast, Bobbio does reconstruct legal analogy according to the Aristotelian schema of the *paradigm* in *L'analogia...*, *op. cit.*

It is clearly anything but the chance that, on the one hand, this concept of *coherence* is so vigorously supported by the author who has brought such attentive consideration of hermeneutics into the English-speaking tradition of studies on *legal reasoning* and legal theory;³¹ and that, on the other hand, in the US, the aspect of *coherence* as *integrity* in law is emphasized by just those authors who show considerable interest in the comparison between legal and literary interpretation.³² The unescapable question at this point becomes: What is it that makes a text into *that* story? Not *a* story, note, but *that* story; for here, it should not be forgotten, the point is to justify the single conclusion that is offered as acceptable, i.e. the decision: an interpretive decision, and hence a decision of case type C.

There can, I feel, be only one answer: what makes the text into *that* story is nothing other than the culture of its users, a culture of which the figure, i.e. representation, of the author of the text is also a function.³³ It is in this way that, as suggested earlier, the *congruity* that is the meaning of *coherence* closest to that in MacCormick's article becomes converted into *consensus*.

8. This conversion is, as may well be imagined, still clearer in the second procedure, applicable in cases of "maximum gap": the procedure that the tradition calls *hetero-supplementation*. This in fact consists, let us recall, in drawing the right conclusion among those the law admits, from outside the law.

This may mean adding a premise to the set of possible premises for the external justification, this set consisting of the norms of valid law, i. e. may mean amplifying the basis supplied by the text. But it may also signify choosing a portion of the text usable as premise for the external justification, ignoring others that might also be usable, but would lead to different conclusions (i.e., obviously, to less welcome or appropriate decisions).

These are the two situations to which the tradition refers as cases in which valid law does not supply criteria for filling a lacuna, or resolving an antinomy. From the logical viewpoint that interests us here; these are absolutely equivalent situations, so I shall speak of them together. They are, in

³¹ See particularly, N. MacCormick, *H.L.A. Hart*, London, Arnold, 1981.

³² On this see the essay by G. Zaccaria elsewhere in this book.

³³ Cf. the hermeneutic doctrine of *Besser-Verstehen*, according to which the interpreter may be able to understand the text better than the author, and the law may be *klüger* than the legislator.

the same way, cases of logical deficiency of the text that bring about a situation of undecidability.³⁴

The decision arrived at in the two cases, then, is based more or less directly on an addition to the text. This is obvious in the case of *lacunae*; perhaps less so in the case of *antinomy*, in which the addition is that of the criterion for resolving it.

At any rate, in both cases, the final decision is more or less directly deduced from this added norm; which is to say that, as always, even in the "hard case" (rare in the case of the legal culture of civil-law systems) in which the decision is explicitly justified through mere considerations of substantive justice, what justifies internally is always and only *consistency*; in short, internal justification, we repeat, can always only be deductive.

There remains the problem of external justification, of course. It seems clear to me that when the decision is selected among the various *compatible* solutions because it is, we say, the just or appropriate one, what justifies externally is *directly* the *consensus*, bypassing *congruity*.

This is in fact tautological. In this case, since the rule of decision is not in fact grounded in any way, there are only two possibilities: either the decision itself is regarded as unjustified or there is consensus as to the rule of decision. In other words: if, in this case, what the judge supplies is regarded as a justification, i.e. is accepted as such, that means that there is consensus as to the rule of decision.³⁵

III THE WORLD

9. Let us now move from the *text* to the *world*. Let us, that is, now come to speak of the external justification of the factual statement constituting the minor premise of the final syllogism of the decision, or internal justification.

I will recall, since it will become relevant here, that in these pages I am basing myself essentially on Italian legal experience and theory, i. e. on a civil-law system, in which the method of criminal procedure (and I am referring particularly to this rather than to civil procedure) is not *accusatorial*,

³⁴ Cf. N. Bobbio, *Teoria dell'ordinamento...*, *op. cit.*, chaps. III and IV.

³⁵ This great importance attributed, implicitly or explicitly, to *consensus* brings contemporary theories of *legal justification* very close to the approaches of topic and rhetoric. One need mention only how much Alexy owes to Habermas, and how much Aarnio owes to Perelman. Cf. also G. Haarscher, "Perelman and Habermas", in *Law and Philosophy*, V, 1986/3, pp. 331-342.

but, as we are taught, mixed or eclectic, with many characteristic features of an inquisitorial procedure.

Here the *certain* premise is the *true* premise. Hence, what fully justifies the minor premise of the final deciding syllogism is, or ought to be, in the last analysis only *correspondence* with the facts. It is only a statement that corresponds with the facts, i.e. represents them as they actually happened, that can in principle be regarded as certain, i.e. justified as being taken correctly, and taken correctly as being true.

But this basic idea, which in my opinion cannot be given up, is, I must admit, not very productive in this context, in which argument must clearly turn not around the meaning of the term "truth", but on the criteria for ascertaining that a statement is true.³⁶

Accordingly, it is not enough to say that it is correct to assume as minor premise of the internal justification only a factual statement that is true, as corresponding to the facts. For once this is established, it still remains to establish whether the statement has been correctly taken as true.

This is the problem of *proof*. The argument I shall conduct on proof will essentially repeat the stages of the one just presented, turning around the assumption of the major normative premise.

Just like a certainly valid norm, the certainly true proposition (factual statement) is one the assuming of which does not require justification. This can be so only where the fact to which the proposition refers has been directly perceived by the judge, or where he has been directly offered a representation of it, the faithfulness of which it is impermissible to doubt, given the state of knowledge and competencies. Much more frequent, very much more, however, is the case in which the true factual statement is assumed at the conclusion of an argument.

Let us leave aside the consideration, to which some attention is no doubt due, that this distinction is in fact culturally relative, since in reality the factual statement is always taken as true at the conclusion of an argument (given that, for instance, what has been seen is not said merely to have been believed to be seen³⁷). Let us instead concentrate our attention on cases in which, expressly and explicitly, not merely at the level of implicit presup-

³⁶ Cf. note 11 above.

³⁷ Cf. F. Cordero, *Tre studi sulla prova*, Milan, Giuffrè, 1963, pp. 6-7: "even in the infinitesimal time of perception, syllogistic moves are made on which belief in the messages taken in through the senses is based". Cf. also C.S. Peirce, *Collected Papers*, 5.182 - 5.185, on "abduction in perceptive judgments".

positions, a proof, which is indubitably a sign,³⁸ is taken as a symptom (i.e. as index and not as symbol³⁹) of something other than itself, namely the fact to be proved. There is only one case in which a fact not directly perceived is nevertheless taken as indisputably having happened, i.e. in which the proposition representing it is taken as indisputably true: namely the case in which the proof cannot be anything but a sign of that fact.

For the presence of fire (A) to be conclusively proved by the presence of smoke (B), it is not sufficient for fire to make smoke, but it is necessary for smoke not to exist without fire. Thus, it is not enough that:

if (A), then (B),

but there must be:

if and only if (A), then (B),

i. e.

if (B), then (A).

It is only then that we may infer A from B simply by *modus ponens* i.e. by a perfect syllogism in Barbara, first figure.

10. What is informally called indubitable proof of a fact,⁴⁰ i.e. the full justification of the proposition representing it, is secured through the deductive derivation of that proposition. There is no other indubitable proof than demonstration on the basis of true premises.⁴¹

Once again, then, in reference also to justification of the factual minor premise of internal justification, it emerges that what finally justifies is

³⁸ Cf. A. Giuliani, *Il concetto di prova. Contributo alla logica giuridica*, Milan, Giuffrè, 1961, eds. on the rhetorical theory of the sign "as instrument for extending our awareness beyond what is an object of observation and of sensation" (p. 37). On the various meanings that the term "proof" takes on in law and in legal discourse, cf. J. Wroblewski, *Proof in Law*, paper presented at the III International Convention on Legal Semiotics, Messina, 1987, in press.

³⁹ Cf. C.S. Peirce, *op. cit.*, 2.248-9.

⁴⁰ Informally, and incorrectly, "for a 'fact' cannot be proved *a posteriori*, but only experimented or found at the moment it happens. What is proved ... is ... the truth or otherwise of an affirmation." (G. Ubertis, *Fatto e valore nel sistema probatorio penale*, Milan Giuffrè, 1979, p. 91).

⁴¹ "The whole system of evidence is based on deduction from a known fact to an unknown fact through experience" (P. Saraceno, *La decisione sul fatto incerto nel processo penale*, Padua, 1940, p. 74). But discussion is open as to whether the same concept of "experience", and hence of "true premise", can in the same way cover both scientific laws and the so-called "maxims of experience" (see below).

always, and only, *consistency*. In fact, the proof of the truth of the factual statement (A) can be only the true factual statement (B), on the basis of a general proposition linking facts of type (A) to facts of type (B) within a theory, i.e. within a scientific or deductive system.⁴²

For there to be proof, then, for the minor premise of the final deciding syllogism to be regardable as fully justified, it must in turn be the conclusion of a syllogism the minor premise of which will be the statement reporting the true fact that we call *proof*, and the major premise a scientific law, i.e. not any general proposition, any generalization, whatever; but only one that guarantees the statement of the minor premise the role of scientific explanation of a fact: namely of the fact to be proved.⁴³

Let us consider the example most frequently adduced in this connection, namely alibi. It is absolutely certain that John Doe cannot have been the material author of a crime committed in Milan, if it is absolutely certain (we shall not here ask how ascertained) that he was in Rome at the time and date of the crime. His being in Rome is a proof of his not being in Milan, since it is not only past experience not yet contradicted by other experience that suggests this nor only common notions - ideas based on a conception of the normal, of what tends to happen - that gives rise to the subjective likelihood, which is not far from being a judgement, known as presumption.⁴⁴ It is not only "normal" in this sense that, being in Milan, one cannot contemporaneously be in Rome, and vice versa: it is the necessary consequence of some fundamental assumptions of physical theory that do after all constitute the basis for the explanation of so many other phenomena that regularly oc-

⁴² Cf. M. Taruffo, *Studi sulla rilevanza della prova*, Padua, Cedam, 1970, pp. 209-210.

⁴³ It is worth thinking again about the conclusion of H. Levy-Bruhl's book, *La preuve judiciaire. Etude de sociologie juridique*, Paris, Rivière, 1964. This book, which takes as its main theme the difference between legal proof and scientific proof, since "la preuve judiciaire a pour objet de faire obtenir par l'intéressé la ratification, l'homologation de la collectivité ... on comprendra que la recherche de la vérité passe au second plan" (p. 29), concludes with the following words: "Il y a lieu toutefois d'observer - et cette remarque est assez réconfortante - qu'à examiner le problème dans son ensemble et dans une perspective historique, la preuve judiciaire se rapproche progressivement de la preuve scientifique, et qu'ainsi le nombre des cas d'injustice ou d'erreurs, qui sont particulièrement cruelles et graves, parce que le groupe social les a corroborées tend à diminuer. Mais il n'est guère permis d'espérer qu'elles disparaissent jamais." (p. 152).

⁴⁴ On the idea of the "normal" and the related opposition between *praesumptio* and *probatio*, and the opposition between subjective probability and objective probability, cf. A. Giuliani, *Il concetto di prova... op. cit.*, pp. 65-69 ff.

cur, and are the basis for the prediction of so many other events that regularly turn out accordingly.⁴⁵

What is at stake here is something big. It is the distinction, fundamental to legal certainty and hence to the freedom of all, between *proof* and *evidence*.⁴⁶ It would be a major error to seek casually to draw the consequence of the irrelevance of this distinction from the post-positivist epistemology which rejects, in giving an account of the structure, success and advances of scientific knowledge and theories, the idea of correspondence with facts, and that of definitive truths and absolute certainties.

What is not explained, nor explicable, at the present state of knowledge will not necessarily never be so, I agree. It is however certainly unlikely, and for that reason alone we should refuse to accept it, unless it is or has been proved by other means, following other procedures in which, even after enquiry, no fallacies have been met with.

Not even scientific laws, not even those which (apart from being empirical generalizations) are valid within a theory – or “deductive system(s) in which, from the conjunction of the observed facts with the whole set of fundamental hypotheses of the system, there logically derive certain observable consequences”⁴⁷ – can be regarded as absolutely true, as definitively certain. They should however be accepted, with what derives from them, at least as long as no contradictions have emerged between them and what derives from them and other observed facts.

⁴⁵ Under what the text says, incorporation of scientific laws into the category of “maxims of experience” (on which see above), advocated by G. Bellavista - G. Tranchini, *Lezioni di diritto processuale penale*, IX ed., Milan, Giuffrè, 1984, p. 309, seems highly disputable. For a decidedly opposite view, in my opinion highly justifiable, see G. Umbertis, *Fatto e valore... op. cit.*, p. 68, note 74.

⁴⁶ The terminology in Italian legal theory and case law is unfortunately not totally consistent. Sometimes what I here call ‘prova/proof’ is called ‘prova indiziaria/evidential proof’ and what I call ‘indizio/evidence’ is called ‘elemento indiziante/indicative element’ (cf. App. Napoli, 15 September 1986, in “La giustizia penale”, 1987, part II, col. 488); sometimes what I here call ‘prova’ is called ‘prova piena/full proof’ and what I call ‘indizio/evidence’ is called ‘prova indiziaria/evidential proof’ (cf. B. Bellavista, “Indizi”, in *Enc. Dir.*, vol. XXI, Milan, Giuffrè, 1971, p. 228). Despite all the terminological confusion, the conceptual distinction remains, it would seem, fairly precise.

⁴⁷ Cf. R.B. Braithwaite, *Scientific Explanation. A Study of the Function of Theory, Probability and Law in Science*, London, Cambridge Univ. Press, 1953 (Italian trans. Milan, Feltrinelli, 1966, p. 28).

In virtue of the same principle of economy which we have referred to in justification of the normative premise,⁴⁸ not even justification of the factual premise can admit systematic doubt.

Neither a scientific theory, nor the scientific proof of a fact based on theory, are valid in definitive, irrefutable fashion.⁴⁹ But at least for the judge, who like the historian is a consumer, as has been well said, and not a producer of scientific theory,⁵⁰ theory and the related proof are valid pending proof to the contrary. It is not for the judge to test any scientific theory or any of the so-called laws of nature. He has to assume them as certain, at least as long as they do not conflict with data that he likewise has to assume as certain.

11. This does not, I have said, mean that every factual premise assumed in legal argument as scientifically proved, i. e. proved deductively on the basis of sure premises, is purely a conjecture, a mere hypothesis; nor does it mean the contrary, i.e. that the judge cannot give the minimum credit to conjectures, hypotheses, put forward during the trial. It means only that there is a very clear difference between proved assertions of fact and mere conjectures or hypotheses.

The conjecture or hypothesis is the assertion of a fact not justified by *consistency*, but only by *compatibility*. Where the case of the factual assertion proved deductively is that of the "minimum gap", the case of the conjecture is that of the "maximum gap" between the outcome of the proceedings and the factual minor premise of the final deciding syllogism.

Just like the rule of decision, the assertion of fact too may be presented not as the *sole* correct conclusion that the procedure of external justification draws from the outcome of the proceedings; but as *one* of the possible conclusions: the one regarded as the *best*.⁵¹

⁴⁸ See note 19 above.

⁴⁹ "Legal semiotics rejects so-called intuitive 'truths' or those revealed by oracles or acquired through means alien to the prevailing epistemology ... All that counts are experiences that jibe with the scientific canon, for as long as it lasts (it would be naive to suppose, given that progress is continuous, that the irrationalistic flood had been exhausted in the past)." (F. Cordero, *Guida alla procedura penale*, Turin, UTET, 1986, pp. 320-321).

⁵⁰ For the historian, cf. C.B. Joynt - N. Rescher, "The Problem of Uniqueness in History", in *History and Theory*, I, 1961, p. 154; for the judge, cf. F. Stella, *Leggi scientifici e spiegazione causale nel diritto penale*, Milan, Giuffrè, 1975, p. 153.

⁵¹ See Part II above, Sections 6, 7 and 8.

Accordingly, the case of "maximum gap" by comparison with the factual assertion is the well-known and much-studied one of evidential procedure. The problem that arises at this point is: What justifies the factual conclusion in the case of evidential procedure, the case in which, by definition, neither *correspondence* nor *consistency* are of assistance?

Here too, in my opinion, a distinction should be drawn between *compatibility* and *congruity*. In parallel, a distinction should be drawn between the various roles played, the various functions carried out, by the person constructing the argumentation on the fact. I distinguished above between solving a problem and deciding a case, using the distinction between *text* and *world*. We then saw that we may in fact speak of decision even in reference to the *text* alone: not of the decision in case C₁ which exists solely in the *world*, but of the decision in cases of type C, i.e. of the interpretive decision.⁵² The time has now come to clarify the point that even in reference to the *world* alone, i.e. without considering the *text*, a distinction may be drawn between solving a problem and deciding a case; here too the distinction should be linked with a distinction of functions and roles.

This time it will not be between jurist and judge, but between *detective* and judge.⁵³ The distinction drawn in metascience between context of discovery and context of justification is extremely relevant here, even though it should be further amplified.⁵⁴ Let us try to clarify this, proceeding in order.

12. Sometimes, as I have said, the factual statement is not presented as the sole admissible conclusion given the outcome of the proceedings, but as one of the conclusions that are not incompatible with it. This factual statement is then presented as coherent with that outcome, though not necessarily deriving from it. In place of this ambiguous term "coherent", the concept of which always needs clarification (one must always say: "coherent because ..., and instead not because ..."), I feel that the fundamental concepts to use here might be the following two: *abduction* in reference to the logical procedure followed and *likelihood* in reference to its logical conclusion.

⁵² See Part II above, Section 4.

⁵³ I would emphasize that the figures presented in these pages of the *jurist*, *judge* and *detective* in no way claim to correspond exactly to specific social roles: in different social and legal systems, in fact, their respective competencies may vary, even a great deal. In these pages I proceed by assumptions (cf. Part I. Section 1), abstracting from historical and social peculiarities and allowing myself to be guided primarily by epistemological considerations.

⁵⁴ Cf. G. Uberti, *Fatto e valore...*, *op. cit.*, p.56.

However much both the logical procedure and the sense in which the conclusion can be called sound or reasonable in the case of "maximum gap" resemble each other in argumentation about norms and about facts, it is only here, i.e. only in reference to argumentation on facts, that I have for the first time used the terms "abduction" and "likelihood". This is not chance. The use of the terms "abduction" and "likelihood", like the use of the term "probability" which should, though, be clearly distinguished from those in meaning, indisputably locates the discourse within the theme of induction.⁵⁵ And I as a non-cognitivist regard it as absolutely impossible to abandon the thesis that there is no meaning in speaking of inductive justification of norms.⁵⁶

From the strict point of view of formal logic, abduction, the operation of which, according to Charles S. Peirce, is carried out whenever an explanatory hypothesis is adopted,⁵⁷ is simply a fallacy: the fallacy known as "affirmation of the consequent". The structure of abduction is in fact as follows:

P₁ if A, then B

P₂ B

C A ⁵⁸

⁵⁵ Charles S. Peirce, *Collected Papers*, 5.197: "what is a good abduction? Or what should an explanatory hypothesis be like in order to be acceptable as a hypothesis? Clearly, it must explain the facts ... what is the purpose of an explanatory hypothesis? Its purpose is to be subjected to the test of experience, so as thereby to arrive at elimination of the unexpected and at the formation of a habit of positive expectation that will not be disappointed".

⁵⁶ Cf. the texts cited in note 5 above.

⁵⁷ "Long before I classified abduction among inferences, it had already been recognized by logicians that the operation of adopting an explanatory hypothesis (and it is in this operation that abduction consists) has to be made subject to certain conditions." (Charles S. Peirce, *op. cit.*, 5.189).

⁵⁸ This is what Peirce writes (*loc. cit.*): "The form of the inference is as follows:

The surprising fact C is observed;

But if A were true, C would be explicable as a normal fact;

Accordingly there is reason to suspect that A is true.

Thus A cannot be inferred abductively, or if you prefer an alternative expression, A cannot be conjectured abductively, unless its whole content is already present in the premise: "If A were true, C would be explicable as a normal fact."

Technically, P_2 is the evidence. Again technically, even though - let us suppose - both premises are absolutely certain, C is, on the basis of them, no more than likely; whether it is more or less probable is undecidable. C is a mere conjecture, a hypothesis; it is consistent with P_2 in a sense that seems different from mere non-contradiction, in the sense that it would explain it assuming that, given P_1 , if C were the case, P_2 would have to be the case, i.e. would necessarily be true.

Is this perhaps a fourth sense of *coherence* which it is reasonable to introduce only in reference to justification of assertions of fact, but instead does not belong in the process of justifying norms? Let us see.

From the point of view of formal logic, or, and this is the same thing, in the context of justification, in connection with that argumentative structure, once one has said that it is invalid, all that is to be added is that C is compatible with P_2 . Saying that C may be the reason for P_2 or that C would explain P_2 adds nothing to that description, assuming that C would in any case be only a sufficient, but not necessarily, reason for P_2 .

This *coherence*, then, from the logical point of view, i. e. in the context of justification, is mere *compatibility*: accordingly, we do not have a fourth sense of "coherence" here, but one of the three already identified, namely the second. This justifies not one, but several conclusions: logically, infinitely many conclusions, all of them compatible with the facts as ascertained. This means that there is no acrobatics of argument or rhetorical artifice that can hide the difference that exists between *evidence* and *proof*, because, simply, the finding of such a difference is a task for logic:⁵⁹ it is, in fact, the difference we have already analyzed between *consistency* and *compatibility*, nothing else. It further means that, however certain, numerous, relevant and concordant the pieces of evidence may be, from them, whatever one may say, all that may be derived is *conjectures*.

To be sure, the conjectures may be more or less reasonable, and some are extremely reasonable. Who would venture to deny that, among the various conjectures, there are substantial differences? The degrees of reasonableness of the conjectures may be infinite. But what is important to stress here is that their meaning is entirely exhausted in the context of discovery:⁶⁰ a context that I, as a non-cognitive theorist, consider there is no sense in speaking

⁵⁹ And logic and rhetoric, in my view, constitute two complementary, not alternative, approaches to a theme.

⁶⁰ Assuming, of course, that "discovery" means something different from invention or from mere understanding.

of in reference to norms, i.e. to the *text*, but only in reference to facts, i.e. to the *world*.

In the context of discovery, i.e. in the enquiry phase, it is for the *detective* to gather the evidence and thereon build hypotheses and assess their reasonableness. The hypotheses are constructed and assessed on the basis of the evidence gathered, and not every fact or event ascertained is treated as evidence, but only the surprising fact, the extraordinary circumstance, which, in the light of common expectations, or of what we are accustomed to call *normal*, ought not to have happened, but which would instead be perfectly explicable by the hypothesis.

Be it noted, the fact that *it ought not*, and not the fact that *it could not*, have happened if the hypothesized fact has not happened; since otherwise it would be a proof, no longer a piece of evidence. Otherwise, the fact represented by the proposition that acts as conclusion to the argument would be not an explanation, a reason, but the necessary reason, for the certain fact represented by the minor premise of the argument; so again what would justify the single conclusion would be *consistency*. Then we would indeed be certain that the conclusion of the argument corresponds to the facts as they occurred, in the *world* outside the argument, and the argument might very well appear in the motivation of the sentence, being this time perfectly capable of justifying the minor premise of the final deciding syllogism.

13. Accordingly, just as in reference to the *text*, *compatibility* justifies the various solutions the law admits and the jurist finds, so in reference to the *world*, *compatibility* justifies the various solutions that the reconstruction of the ascertained facts admits and that the *detective* identifies. The jurist is the *detective* of the text and the *detective* is the interpreter of the world.

As we have said, the judge's function is different: it is to decide cases, not seek to resolve problems. But it is more different - as already said with reference to the jurist and the *text* - in principle than it is in the actual practice of the search. The same thing may be repeated with reference to the *detective* and the *world*.

Frequently, in fact, the *detective* acts not so much as interpreter of facts and reporter of facts but as solver of riddles; and this representation of the *detective* is not merely a self-representation, being, for instance, presupposed by the common expression "solve a case" (an expression I have deliberately avoided using here; I have however used the expressions "solve a problem" and "decide a case"). The *detective*, that is, lets himself be gripped by the quite incontrovertible conviction that among the many admissible solutions or reasonable hypotheses only one is the right one: the *true* one. He thus forgets, however, that there is no guarantee at all that the data sufficient for

finding the right solution are all accessible, and that the method to arrive at knowledge of the truth is also available and known.⁶¹

And since the *world* does not, as do most puzzle-magazines and detective stories, have a last page to check the solution by, our question still remains to be answered: how is one to justify *one single* solution, where neither *correspondence* nor *consistency* are of assistance, among the various *compatible* solutions?

14. This is the question that MacCormick answers by using the concept of *narrative coherence*. Here, before discussing this concept, I wish to clear the field, in reference to a civil-law system, of one conceivable answer which, in my view, is extremely dangerous: the one that uses the concept of "maxim of experience" (*Erfahrungssatz*).⁶²

Legal scholarship on the matter seems to me, in fact, to assume that on the basis of a mere empirical generalization, even if without the typical connotations of laws of nature I have spoken of, i.e. on the basis of a "maxim of experience", it is possible to secure more than a mere conjecture, as long as the derivation is logically rigorous and the data represented in the minor premise absolutely certain.⁶³ This is a grave error.

There is no logical and deductive rigour that can do more than transfer to the conclusion the value of the premises; accordingly, no conclusion to a syllogistic argument can ever be more certain than the least certain of its premises.⁶⁴

The notion of "maxim of experience" is a counterpart to the notion of *evidence*: neither can lead to more than a conjecture,⁶⁵ and both fit perfectly

⁶¹ Accordingly, the following affirmation seems to me disputable: "The policeman is a solver of riddles, not an interpreter of obscurities. His abductive art must, then, be that of the *enigmatographer*, not *hermeneutics*." (M.A. Bonfantini - G. Pronti, "To Guess or not to Guess", in U. Eco - T.A. Sebeok, *Il segno dei tre. Holmes, Dupin, Peirce*, Milan, Bompiani, 1983, p. 148).

⁶² Cf. F. Stein, *Das private Wissen des Richters*, Leipzig, 1983.

⁶³ Cf. G. Bellavista, "Indizi", *op. cit.*

⁶⁴ Cf. V. Manzini, *Trattato di diritto processuale penale italiano*, vol. III, Turin, UTET, 1956, p. 418.

⁶⁵ It is therefore hard to understand what is meant by "the constant refusal to confound evidence with conjecture" (see G. Bellavista, "Indizi", *op. cit.*, p. 229). The passage becomes capable of disturbing interpretations if it is linked to what is written a few lines above: "... the ineluctable need not to leave unpunished crimes that elude full, direct proof" (*op. cit.*, p. 228).

into the argumentational mechanism of *abduction*. In fact, a syllogism with a "maxim of experience" as major premise is nothing but an abduction in whose major premise antecedent and consequent have been inverted.

Let us take, and deal freely with, Peirce's classical example of abductive inference. In a room there are white beans on a table, a bag (W) of white beans, and a bag (B) of black beans on the floor. It is inferred abductively that the beans on the table come from the bag of white beans. In reality we cannot know this. We can only construct the following argumentational structure:

If the beans on the table come from bag (W), then the beans on the table are white;
the beans on the table are white;
therefore the beans on the table come from bag (W).

The two premises are certain, but the conclusion is a mere conjecture. But it is our experience that there is nothing in the room but a table and the two bags of beans; we do not know that someone has come in bringing a handful of beans, nor can we conceive what interest anyone might have had in that (yet we do not even know with certainty that no-one has come in!). Accordingly, we feel justified in asserting, though obviously without being able to be quite certain of it, that if some beans are white, they come from bag (W). On the basis of this premise ("maxim of experience"), we construct the following syllogism:

If the beans on the table are white, they come from bag (W);
the beans on the table are white;
therefore the beans on the table come from bag (W).

The syllogism is perfect; but the conclusion is still a mere conjecture. Suffice that for the moment as far as "maxims of experience" go.

15. Let us now come to *narrative coherence*. The favoured, the best, hypothesis will be the one that is *coherent* with the facts ascertained, which means, writes MacCormick, the one that gives the story a meaning. Clearly, this is the *congruity* I have talked about earlier in reference to justification of the rule of decision. The question to ask now is: can *congruity* manage to justify the minor premise of the final deciding syllogism?

By contrast with McCormick (who, however, in the second version of his article, seems to attenuate the thesis expressed in the first⁶⁶), I do not think so, for reasons I shall now explain.

The *world* does not have meaning; only a *text* can. There is no meaning in events that happen nor actions done in the *world* (unless the intentional meaning of the actors⁶⁷). There may be meaning in the *text* that recounts the events and actions that happened in the *world*, thereby making it into a story. But it is then quite clear that the meaning is a function of the interpreter of the *text*.

Here we should return to a mention I have already made of one fundamental distinction: between likelihood and probability. There is no direct proportion between likelihood and probability. The best hypothesis is simply the one that makes the text of the account the likeliest story, i.e. the most credible one, given what is taken to be the normal or regular development of facts, the common or regular behaviour of people. But how probable is it? This remains completely unprejudged as long as we remain within the mechanism and procedure of constructing, perfecting and selecting hypotheses: until we move from that to verification, to the *world*.⁶⁸

⁶⁶ More significant than all the other additions is, from my viewpoint, the last one, namely the addition of the paragraph closing the second version of the article, which I repeat here in *extenso*: "Finally, however, although there are these parallels and connections between our two sorts of coherence, there remains an important difference. Narrative coherence has to do with the truth or probable truth of conclusions of fact. Coherence here justifies beliefs about a world whose existence is independent of our beliefs about it. But, as Ota Weinberger has so often and so convincingly shown, there is no analogous reason for believing in some sort of ultimate, objective, humanly-independent truth of the matter in the normative sphere. Coherence is always a matter of rationality, but not always a matter of truth." (N. McCormick, *Coherence in Legal Justification*, op. cit., p. 53).

⁶⁷ Cf. Max Weber, *Wirtschaft und Gesellschaft*, vol. I, I.1.

⁶⁸ "The traditional distinction between *sign* and *symptom*, founded on the characteristics of the artificiality, voluntariness and conventionality of the former, and those of naturalness, unvoluntariness and motivation of the latter, does not appear entirely satisfactory when it comes to the texts considered here, at least if understood as an inviolable frontier. It runs into difficulties particularly in cases that are part of *simulation*, i.e. the voluntary production of symptoms. Think of a footprint on a beach. However much it may seem to be an obvious case of a natural "sign", there is nothing to prevent it having in particular circumstances been produced intentionally with the purpose of diverting an enquiry. Regarding it as evidence or sign will therefore depend on the interpretive hypothesis, on a (motivated) choice by the investigator ... of course simulation, as being creation of a surreptitious but not unfounded reality, is founded upon the coherence and likelihood of the evidential frame which it constructs." (G.P. Caprettini, *Le orme del pensiero*, in U. Eco - T.A. Sebeok, *Il segno dei tre...*, op. cit., pp. 161-162). Cf. App.

The room with the bags on the floor and the handful of beans on the table is a metaphor for the text. To be able to calculate the probability that the beans on the table come from bag W, we have to know something about the world outside the room: if there is someone who could have come in, and might have wanted to, and bring in beans from outside.

We shall never know with absolute certainty. Verification is in principle impossible, given that the question we are asking is whether it is admissible for *congruity* to provide justification where neither *correspondence* nor *consistency* are of assistance. Hence the answer can only be negative.

This may nevertheless seem unreasonable and even contrary to experience. Is it not true, then, that in court hypotheses are weighed and the best one wins?

The very endeavour to answer this question brings us very significantly in the direction of the solution. For that is not true at all in courts in which inquisitorial procedure is carried out, or dominates, and the judge seeking "material truth" takes the proofs in his own person, and is obliged to justify, in his motivation, his own "free conviction".⁶⁹ It is true only in courts where *adversary* or *accusatorial* procedure takes place, founded on the liberal idea, or ideology, that truth emerges from discussion, from the comparison or clash of opposing opinions, from argument,⁷⁰ and the judge is only an impartial referee.⁷¹

Napoli, 15 September 1986, *cit.*, col. 483: "...one cannot regard as a (logical) element of confirmation the observation according to which the declaration to be verified provides a logically and psychologically acceptable explanation (as the Corte di Cassazione has also sometimes affirmed), since this must be a constant characteristic of any declaration, not an external element of confirmation. A declaration without it should not even be considered, but immediately discarded, since the illogical, the irrelevant or the inexplicable ought not even to be taken into account; otherwise a well-devised lie can be made to pass for truth, and a skilful liar can be credited with being a sincere person. Let the accused prove the contrary if he can."

⁶⁹ Cf. M. Nobili, *Il principio del libero convincimento del giudice*, Milan, Giuffrè, 1974.

⁷⁰ For the "liberal" resumption of this ancient idea on the threshold of the contemporary epoch, see C.A. Helvetius, *De l'Homme* (1770), Section IX chap. XII: "C'est à la contradiction, par conséquent à la liberté de la presse, que les sciences physiques doivent leur perfection ... Ce que je dis du physique est applicable au moral et au politique. Veut-on en ce genre s'assurer de la vérité de ses opinions? Il faut les promulguer. C'est à la pierre de touche de la contradiction qu'il faut les éprouver."

⁷¹ See Z. Bankowski's article in this collection. I wish however to stress that the case of *Rex v Smith*, adduced as example and discussed very summarily by MacCormick in his article on *coherence*, the case of the "Brides in the Bath", is much cited by common-law

Be it noted, though, that what justifies the reconstruction of the facts as it emerges in the adversary system, which from this viewpoint may well be regarded, at least in intention, as an attempt to achieve what Habermas has recently called the "ideal linguistic situation",⁷² is not *congruity* at all: it is *consensus*.⁷³ And in this procedural system the judge does not have to *choose* the best hypothesis (the one he regards as best), nor does he have to *justify* his conviction that the facts occurred according to that reconstruction: the judge has to *accept* the hypothesis, i.e. the reconstruction of the facts, that has scored most points, that has passed the test of confrontation, i.e. has secured *consensus*. But did the facts, in the *world*, occur just like that? The judge will probably never know.

"In the possible worlds of the imagination things go better. Nero Wolfe invents elegant solutions to inextricable situations, then brings all the suspects together in his office and tells "his" story *as if* things had gone just like that. Rex Stout is kind enough with him to make the real guilty party react, thereby admitting guilt and recognizing Wolfe's mental superiority. Be it noted that it would suffice for the guilty party to calmly reply, "But you're mad!", and nothing could then prove that Wolfe was right."⁷⁴

legal scholars in connection with law of evidence, and is one of those upon which there has been constructed an exception to the rule "which excludes evidence relating to transactions other than the one actually the subject of the procedure" (Cf. R. Eggleston, *Evidence, Proof and Probability*, London, Weidenfeld and Nicolson, 1978, p. 59). Here is what Eggleston himself writes in giving an account of this exception: "Of course, the evidence of similar facts can never by itself make a case against the accused. There must at least be evidence as to the offence charged with which the similar facts can be compared ... the similar fact evidence ... must add very substantially to the probabilities in favour of guilt." (p. 96). These words, I feel, take away much of the plausibility of the thesis that, in "similar fact evidence", what fundamentally provides justification is *coherence*, in MacCormick's sense.

⁷² Cf. J. Habermas, "Wahrheitstheorien", in H. Fahrenbach (ed.), *Wirklichkeit und Reflexion*, Pfullingen, 1973, pp. 211-265.

⁷³ The extent to which the system of proof in the English-speaking world is dependent on the topical rhetorical conception of trial and proof has frequently been pointed out. Cf. A. Giuliani, *Il concetto di prova...*, *op. cit.*, pp. 189-200.

⁷⁴ U. Eco, "Corna, zoccoli, scarpe. Alcune ipotesi su tre tipi di abduzione", in U. Eco - T.A. Sebeok, *Il segno dei tre...*, *op. cit.*, p. 261.

IV CONCLUSION

16. Justice as the prime virtue of social systems and truth as prime virtue of systems of knowledge are brought together by MacCormick under a single concept, capable in his view of making both of them right: the concept of rationality.⁷⁵

And the prime manifestation of rationality is supposed to be coherence. Coherence would in fact be, if not the proof, at least a symptom of the justice of a system of rules and of the truth of a system of factual assertions.

In these variations on the theme, I have sought to maintain that:

1. *Coherence*, and hence ultimately rationality, in the sphere of law is not an ultimate value but is instrumental vis-à-vis the fundamental value of certainty.

2. The concept of *coherence* cannot, in any of its specifications, bear the weight of the function MacCormick attributes to it, since:

a) as *consistency*, it assumes the justice and truth it ought to prove as already given in the premises;

b) as *compatibility* it does not supply any criterion for choosing among various alternative systems;

c) as *congruity*, it refers back to something other than *coherence*, namely *consensus*.

3. *Consensus* is not the meaning of either "truth" or "justice". The meaning of both "truth" and "justice" is correspondence with something outside the discourse. But both in the sphere in which proof of this correspondence is necessarily unattainable (i.e. in the sphere of justice), and when such proof is contingently unattainable in the sphere in which, again in principle, it might be attained (i.e. in the sphere of truth), the objective becomes certainty; and certainty is not guaranteed by *coherence* in any of its forms, but only by the *consensus* secured in the ideal linguistic situation: nay rather, certainty is actually identified with that *consensus*.

I shall close with an admission, albeit a somewhat reluctant one: perhaps the option in favour of *consensus* instead of *coherence* cannot be argued fully rationally, but it is one of the fundamental philosophical options that guide research rather than being outcomes of it.

Perhaps the way things are is that for a disappointed (or *manqué*) realist, pragmatism is a preferable alternative to idealism.

⁷⁵ Cf. N. MacCormick, "The limits of Rationality in Legal Reasoning", in *Rechtstheorie*, Beiheft 8, 1985, p. 161.

NORMATIVE COHERENCE AND EPISTEMOLOGICAL PRESUPPOSITIONS OF JUSTIFICATION

VITTORIO VILLA

1. In this paper I shall, taking particularly the *coherence criterion* into account, survey three of the most significant and controversial contemporary theories of legal argumentation: that is, Aarnio's, MacCormick's and Dworkin's theories. The comparative analysis of these theories will later be used as a point of departure for making further observations on the epistemological framework presupposed - explicitly or implicitly - by the three legal philosophers. With the help of this kind of analysis I will be able, I hope, to single out not only some significant "surface" resemblances at the level of legal argumentation theory, but, above all, certain basic differences (between Dworkin and the other two scholars) at epistemological level. The resemblances concern, in particular, the role played by the coherence criterion in legal argumentation; the differences, on the contrary, have to do with the placing of the argumentative discourses inside the "system" of cognitive activities (here the problem is that of the relationship between "argumentation" and "strong" scientific knowledge). I will argue, lastly, that this kind of epistemological disagreement can be fruitfully set inside the contemporary meta-scientific debate on fundamental issues such as *realism*, *objectivity* and *value freedom*.

Unfortunately, the epistemological level of analysis is very much neglected by contemporary legal philosophy. This is, in my opinion, a wrong attitude: as a matter of fact, background epistemological theories very strongly affect legal theories, for instance by supplying methodological models for legal science and practice, or giving help in selection and interpretation of relevant legal "data". Furthermore, without an adequate understanding of these presuppositions it is, in my opinion, quite difficult, to get a proper grasp of not only some very important philosophical dimensions of legal theories (for instance, the world-view implied by certain epistemological claims), but also some relevant aspects of the very stimulating critical

debate which is today developing among competing legal research traditions. If, for instance, equipped with epistemological spectacles, we look at the critical debate between Dworkin and his legal positivist critics (for instance Aarnio and MacCormick), we shall find that some criticisms against Dworkin are "ill-dressed", because they do not take into account the existing epistemological differences on the nature of legal reasoning. But, this does not, of course, necessarily mean that Dworkin's theory is correct.

2. The coherence which I will make reference to throughout the paper, as a *criterion of legal justification*, is not so-called "narrative coherence". The latter is, at least in the definition proposed by MacCormick, a kind of empirical inductive justification which, in judicial trials, provides a test of truth in cases where direct evidence obtained through sensory observation is not available.¹ Coherence, in this strict sense, is not a useful concept for the purposes of my paper, *firstly* because it does not provide a common conceptual basis for the kind of comparison I wish to develop here (Dworkin, for instance, gives a very different interpretation of narrative coherence from MacCormick's one: in Dworkin's opinion the "facts of narrative coherence" are very dissimilar to "hard facts";² *secondly* because, at least in the empirical version, it does not exhibit a relevant connection with the epistemological issues which represent our main interest here.

In this paper, therefore, I will pay great attention to the concept of normative coherence. There is, on this subject, valuable agreement among Aarnio, MacCormick and Dworkin. This agreement can be summarized in a sort of common conceptual definition. In this sense, *normative coherence* can be characterized as a *criterion of justification* for legal interpretation - of legislative statements and other normative materials - (*first-level coherential justification*), or for legal theories, from which, among other things, interpretive choices can draw their theoretical support (*second-level coherential justification*). This criterion represents only a component (but an important one) of a complex argumentative procedure which, *in judicial interpretation*, leads to the building of the major premise of the "judicial syllogism", and, *in the interpretation performed by legal science*, leads to the formation of consensus (or promotion), in a given scholarly community of lawyers, on a given theoretical result. The main feature of this criterion lies in the fact that it estab-

¹ See MacCormick (1984), p. 245. On this definition, see also the very interesting observations suggested by Comanducci (1987), p. 274.

² See Dworkin (1985), pp. 138 ff.

lishes a *minimum condition*, necessary but quite often not sufficient, for the acceptability of the interpretive or theoretical result. According to this condition, there must be some sort of *fit* between the outcome in question and the relevant set of legal materials or - higher-level - theories, which are both already "otherwise justified". In other words, they must "hang together" well.

There are two particularly significant elements of this definition, shared by the three legal philosophers in question.

A) The first lies in their common rejection of the identification between *coherence* and *consistency*. The latter is a criterion of logical character, involving only lack of contradictions. Coherence, on the contrary, has a much broader meaning, being synonymous with "fitness", "consonance". In this sense, coherence relates the single outcome not to an undifferentiated and amorphous chaos of legal materials, but instead to a set that is already structured and theoretically reconstructed, in the light of unifying principles and values which make that part of the legal system (or, ultimately, the entire system) a *meaningful whole*. From a structural point of view, therefore, the relationship between the single interpretive or theoretical outcome and the legal system as a whole is shaped in a very similar way by Aarnio, MacCormick and Dworkin.

MacCormick, for instance, says very clearly that normative coherence "is a test which is not fully satisfied by mere consistency", because it "is a matter of their *making sense* by being rationally related as a set, instrumentally or intrinsically, *either* to the realization of some common value ... *or* to the fulfilment of some common principle".³ Aarnio, too, points out that coherence is too weak as a mere logical criterion: the condition required by coherence is, rather, the discovery of "fitness" among legal materials, or of relevant and plausible normative connections.⁴ Similar opinions are held by Dworkin: he says that coherence, in legal interpretation, means fitness among legal materials in the light of a *scheme of principle*.⁵

The important thing to notice is that, from this perspective, coherence is always conceived of as an alternative criterion to *truth as correspondence*. The latter is considered too strong a criterion to be accepted as a good test for argumentative discourses, which, among other things, do not refer to an in-

³ MacCormick (1984), pp. 235-238.

⁴ See, for instance, Aarnio (1987), p. 199.

⁵ Dworkin (1986), p. 219.

dependent and neutral (in respect of evaluative and normative standpoints) "external" reality. Aarnio sides openly with this opinion when he says that "from the point of view of scientific realism, argumentation theory cannot be a truth theory ... because there are no measures of truth independent of the acceptance given by a certain audience". And he goes on to point out that "the truth in legal dogmatics is relative to some versions of the coherence and the consensus theories".⁶ Dworkin, too, holds a similar view when he points out that propositions of law can be considered as true only in the sense of their fitness with other legal materials, and not certainly in the sense of their correspondence with some kind of "hard facts".⁷ And MacCormick, perhaps more implicitly, goes in the same direction when he maintains that it is impossible to apply the model of the correspondence theory of truth to legal reasoning.⁸ According to MacCormick, inside a theoretical perspective built for legal argumentation, there is no "archimedean point" beyond all the competing theories whereby we can judge "one theory ... as better than another".⁹

Aarnio, MacCormick and Dworkin, in short, set themselves, rightly in my opinion, against what has been called, in the specific sphere of law of evidence, the "rationalist tradition of evidence scholarship".¹⁰ More generally, the epistemological model which these legal philosophers fight, in argumentation theory, is the empiricist model with its imperialistic features (all cognitive disciplines must share the same method as the natural sciences).¹¹

This model has always had great success in legal theory; the same thing is happening today, with particular regard to the concept of truth as correspondence.¹²

⁶ Aarnio (1981), p. 35.

⁷ Dworkin (1985), pp. 137-142.

⁸ MacCormick (1978), p. 90.

⁹ MacCormick (1982), p. 130.

¹⁰ This notion is taken from Twining (1985), pp. 1-18.

¹¹ This is one of the main theses contained in a recent book of mine; see Villa (1984).

¹² Two of the most significant attempts in this direction are constituted by some recent works by Niiniluoto (1981a), pp. 53 ff., and (1981b), pp. 171 ff. and by Ferrajoli (1983), pp. 81-130.

B) The second important element of the definition is the shared acknowledgement of the fact that the coherence criterion, at least generally speaking, is not enough to determine the interpretive or theoretical choices unequivocally, above all in hard cases. This is a situation very close to the one that occurs in the empirical sciences, theoretically reconstructed as the "undetermination thesis".¹³ According to this thesis, "there are in principle always an indefinite number of theories that fit the observed facts more or less adequately".¹⁴ In a similar way, in deciding a hard case the judge will always have at his disposal an indefinite number of interpretive outcomes that equally well fit the relevant legal materials. In these cases, the argumentative process must, therefore, necessarily arrive at a further dimension, of substantive character, in which the matter is one of evaluating the content of a legal decision or theory, in terms, for instance, of its justice or equity.

Here, too, there is full agreement among Aarnio, MacCormick and Dworkin. MacCormick, for instance, holds that normative coherence "implies a formalistic ... and relativistic sort of justification", because it does not give an answer to the question of rightness of a certain value or of its preferability among other ones. When we arrive at this point, we need, in MacCormick's opinion, to implement coherence with "consequentialist reasoning".¹⁵ In a similar vein, Aarnio points out that coherence is not enough for determining interpretive choices inside a community at a given level. The consensus of the community upon a "norm contention" can be gained only through the intervention of a new set of higher-level criteria (among them one concerning the sharing of a common set of values).¹⁶ Dworkin, too, maintains that coherence constitutes only a first-level justification; in hard cases, where there are various interpretive outcomes that equally well fit what is otherwise justified, we must decide which one is the best from the point of view of its substantive content.¹⁷

¹³ See particularly Quine (1953), Chs. I, II, and (1960), Chs. I, II.

¹⁴ For this formulation, see Hesse (1980), p. VIII.

¹⁵ MacCormick (1984), pp. 243-244.

¹⁶ Aarnio (1983), pp. 177-180.

¹⁷ Dworkin (1985), p. 143 and (1986), p. 229.

3. These features of normative coherence, shared by the legal philosophers in question, can be used equally well for taking into account their deep epistemological disagreement. This kind of contraposition occurs between Aarnio and MacCormick on one side, and Dworkin on the other. Aarnio and MacCormick stand firmly, notwithstanding some superficial "flirting" with post-empiricism, within an empiricist perspective of "strong" scientific knowledge, which digs a big ditch between *verification procedures* in empirical sciences and *justification techniques* in practical sciences. This kind of opposition passes through a number of important conceptual dichotomies: truth vs. coherence, factual judgements vs value judgements, objectivity vs. subjectivity, "externalism" vs. "internalism", theoretical reason vs. practical reason. In each dichotomy the locution situated on the left expresses the epistemological features of the hard sciences, and the locution on the right those of the practical and hermeneutical sciences, in which cognitive elements are inextricably mixed with other elements of constructive, creative and evaluative character.

Dworkin's view, on the contrary, seems to me radically different. In my opinion Dworkin, quite cryptically and sometimes in an ambiguous and misleading way, presupposes a wholly different epistemological framework, in which those dichotomies are totally out of place. In other words, Dworkin stands, though without the necessary epistemological awareness, with a post-empiricist model, in which the practical, sociological, evaluative components of the empirical sciences are fully acknowledged.¹⁸ Here the key concept is that of the "continuum" between these disciplines and the practical sciences. Furthermore, the idea of an objective world of neutral facts is radically brought into question.¹⁹

I will now try to analyze, in a very rough way, the epistemological presuppositions of Aarnio's, MacCormick's and Dworkin's theories of argumentation. In the case of the first two legal philosophers, we can use the same epistemological framework, given the fact that their views are quite similar, at least in very general terms. This framework can be very conveniently sketched out with the help of two basic epistemological theses, which after

¹⁸ For this kind of approach, see, for instance, the work of Hesse (1980) and that coming from the so-called "Edinburgh school", and particularly from Barnes-Bloor (1982), pp. 21-47 and Bloor (1984), pp. 75-94.

¹⁹ For this kind of criticism of scientific realism, see Goodman (1978), chs. I, VI, VII, Putnam (1981), ch. II, and Rorty (1980), chs. VI, VII, VIII.

all constitute the "stronghold" of contemporary empiricism: the *scientific-realism postulate* and the *value-freedom principle*.

A) *The scientific-realism postulate*

Of course, I shall not in these few pages be able to survey all the main contemporary epistemological perspectives which can be labelled as *realist*. Anyway, what really interests me, given the aims of the paper, is to clarify briefly the theses presupposed by Aarnio's and MacCormick's legal theories. I would, however, like to notice that the concept of realism, at least in contemporary metascientific debate, has various - and connected - meanings, whose variety depends both on the level of reality taken into account (here the relevant distinction is between *common-sense realism* and *scientific realism*, concepts which are not necessarily logically connected,²⁰ and on the kind of epistemic "status" assigned to realist theses (here the relevant distinction is between an ontological²¹ and an empirical²² interpretation of realism).

Leaving apart these sophisticated discussions, I will refer here to the specific concept of 'scientific realism', that is, to the very concept postulated by Aarnio and MacCormick as the basic presupposition of hard sciences, conceived in opposition to practical sciences. The definition I would like to suggest presents scientific realism as necessarily connected with the correspondence theory of truth.²³ Put very briefly, scientific realism is the thesis according to which the aim of "genuine" scientific theories is that of establishing a "mirroring" relationship, through progressive approximations, with a reality made up of entities and objects that:

a) are postulated with recourse to a further dimension, beyond that of the empirical facts which they are inferred from;

²⁰ For this kind of distinction, see the useful work of Devitt (1984), particularly chs. 1, V, VI.

²¹ This kind of interpretation of realism is held, by among many others, Devitt (1984), pp. 12-13 and Trigg (1980), p. 27.

²² The "empirical interpretation" is suggested, among others, by the "early Putnam" (1975), pp. 175-194 and Boyd (1984), pp. 41 ff.

²³ For an adverse opinion, see Devitt (1984), pp. 3-4, 35.

b) have properties and features (for instance, "primary qualities", from which are extracted "natural kinds") which exist, in their proper shape and structure, independently of the theoretical framework adopted in describing them;
 c) constitute, therefore, a neutral and mind-independent reference point for all available theories, which can best be used as an objective parameter for singling out, from an external point of view, the correspondence relationship (if there is one) between theories and reality.

It is true that these epistemological theses are not fully developed, at least in detail, by Aarnio and MacCormick. But they are somehow implied by the adoption of a radically different epistemological model for argumentative disciplines, a model which is explicitly *set against* the other one, at work in the empirical sciences. This line of argument is followed, for instance, by MacCormick. He holds, as we have shown before, that in the practical sciences there is no independent way (from any theoretical and evaluative standpoint) of establishing that a theory is better than another one.²⁴ In MacCormick's words, "of course we do pass judgement on other theories: but we pass judgement from the perspective of one theory or another, from the perspective of that which to us as judges or critics seems to us the most acceptable".²⁵ The conflict among competing legal theories or conceptions of justice "is not a matter which can be decided in a theory-independent way".²⁶ This is, according to MacCormick, a very important feature of the so-called *constructive model*,²⁷ that is, the epistemological model which is suited to the practical disciplines. In the background, even if MacCormick does not say so explicitly, lurks the idea according to which only "strong" scientific knowledge can provide an objective and independent "anchorage" to theories, through the help of the correspondence criterion.²⁸

The same direction is taken by Aarnio, in spite of some attention paid towards the new conceptions of science. Certainly Aarnio deeply feels the influence of the "later Wittgenstein's" thought, above all of his "constructivist" conception of language, seen as social practice. Unfortunately Aarnio,

²⁴ MacCormick (1982), p. 130.

²⁵ *Ibidem*, p. 139.

²⁶ *Ibidem*, p. 139. The italics are mine.

²⁷ *Ibidem*, pp. 130, 139.

²⁸ MacCormick (1978), p. 130.

in accepting these ideas, leaves out of their scope the language of the empirical sciences, and therefore lessens the strength of Wittgenstein's theses. In fact, Aarnio seems to accept scientific realism as the proper philosophical background of the empirical sciences, especially when he says that "from the point of view of scientific realism argumentation theory cannot be a truth theory", because in argumentative processes "there are no measures of truth independent of the acceptance given by a certain audience".²⁹ According to Aarnio, therefore, interpretive outcomes such as "norm contentions" cannot submit to the criterion of truth as correspondence, but, rather, to a *softer* criterion (truth as coherence). In Aarnio's words, "the truth of a norm contention is a relative matter; it is relative in respect to the statement cluster on the coherential background".³⁰ Aarnio, it is true, speaks, in a later work, of a kind of parallelism between scientific theories and interpretive theories:³¹ but it is far from clear whether by this suggestion he intends to bring the realistic presuppositions of his metascientific perspective into discussion.

B) The value-freedom principle

On this issue, too, I cannot go into an examination of the many important questions posed by the principle, whose fundamental significance for contemporary scientific culture cannot be underestimated.

According to a tentative definition, well suited for the aims of the paper, the principle of value freedom can be characterized as a methodological directive which dictates that scientists - at least when they are doing "genuine" science - abstain from value judgements "internal" to their scientific practice. Just like other methodological prescriptions, such a principle needs an epistemological justification.³² This justification is provided, according to empiricism, by a certain image of "good science". It is an important part of this image that "genuine" scientific language be of a "purely" descriptive character. From this point of view, scientific language keeps us in close touch with objective reality and, for this reason, can be fully isolated and sharply

²⁹ Aarnio (1981), p. 35.

³⁰ Aarnio (1983), p. 176.

³¹ Aarnio (1987), p. 70.

³² Villa (1984), ch. I.

separated from prescriptive and evaluative discourses (the "great division"). Factual judgements are radically opposed.

According to this interpretation, the principle of value freedom is strictly connected with the scientific-realism postulate, in the sense that it is specifically in virtue of the special features of scientific language that it is possible to separate it from evaluative statements.

Aarnio and MacCormick seem to share this kind of attitude in respect of value judgements. It is easy to see this, looking at what they say in contrast with the opposite position, the "value ladenness" of the hermeneutical sciences. There is nothing more to say here, after the quotations made with regard to the evaluative dimension of legal argumentation, a dimension which both acknowledge. In the background of these discourses, centred upon the partial subjectivity of value-laden practical sciences, lies a deep conviction of the objectivity of verification procedures and of theory choices in the empirical sciences.³³

I am of the opinion, as I said before, that Dworkin, though unfortunately in a quite confused and ambiguous way, is moving on different epistemological premises. He, in developing the *right-answer thesis* and in striving to meet criticism upon this point, disputes, quite incidentally but anyway very forcefully, the two basic epistemological presuppositions under scrutiny here.

A¹) With regard to scientific realism, the main point of Dworkin's argument against it is an integral part of the counter-attack which Dworkin launches against criticisms addressed to the right-answer thesis. In the course of this critical discussion, Dworkin goes clearly beyond the sphere of argumentation theory and directly faces the real core of the matter: that is, the general problem of realism and objectivity in connection with the evaluation of cognitive claims. It is not an optional development, because Dworkin himself is persuaded that legal theories are always connected with epistemological conceptions.³⁴

The main objection Dworkin has to meet is that judges and lawyers have no objective test at their disposal for legal interpretation (and for theory that can, in case, support it), because, in this context, there are no "facts of the matter" providing an uncontroversial basis for the choice. Dworkin acknowledges all this, but notices that, in agreement with what he quite obscurely calls "an important theme in contemporary philosophy of science"

³³ This is clearly shown in MacCormick (1982), p. 139 and in Aarnio (1981), p. 43.

³⁴ Dworkin (1985), p. 166.

(he could have spoken more clearly of “theoretical holism”), it is a common situation in science that we have the facts we do “in consequence of having accepted some particular theoretical structure”; “if - Dworkin goes on - we held very different beliefs about the theoretical part of physics and the other sciences, we would, in consequence, *divide the world into different entities* (italics added)”. In this case “the facts we encountered about these different entities would be very different from the facts we now take to be unassailable”.³⁵ In a similar vein, Dworkin criticizes the sense in which his critics speak of objectivity in scrutinizing his theory of legal interpretation. According to Dworkin, the supposed objectivity of legal or political arguments does not depend on some sort of direct reference to external facts (as his critics sometimes think), but, on the contrary, on recourse to further and better arguments. It is legitimate to term these arguments “objective”, bearing in mind, however, that this kind of objectivity does not imply reference to a reality which is “external” in respect of our interpretive and argumentative practices. They are all matters “internal” to the practices we perform (and, of course, to the theories we accept).³⁶

B¹) With regard to the value-freedom principle, too, I think that Dworkin's statements on the evaluative and normative character of legal and political theories go very much beyond the context of legal and political theory. Dworkin puts under critical scrutiny the thesis that explaining legal phenomena (first of all, “what is law” in a given historical context) is a merely “descriptive” enterprise. In Dworkin's opinion the propositions of law can never be either wholly descriptive or wholly normative: they may properly be called “interpretive of legal history”.³⁷ It is just this concept of interpretation, above all in the richer version offered in *Law's Empire* which constitutes the proper key for putting radically into question the “descriptive-evaluative distinction”, and not only in the sphere of legal theory. Dworkin certainly refers to law when he says that whatever attempt might be made in order to describe the “law in force” in a certain institutional context, it must exhibit the working of an *interpretive attitude*. This last concept is used to take into account an activity whose aim is not only to ascertain that a given legal practice exists and has certain features, but also, necessarily, to assign contextually a value to the practice in question. “Assigning a value” means

³⁵ *Ibidem*, p. 169.

³⁶ *Ibidem*, pp. 171-174.

³⁷ *Ibidem*, p. 147.

that the practice pursues a goal which is "right" or "good" to follow. In the last resort, for Dworkin, to describe law means also, unavoidably, to give a value to it, that is, to show legal practice "in the best light". This kind of interpretation, called by Dworkin *constructive* (we shall meet this key concept again) is not at work only in the practical sciences; on the contrary, for Dworkin this *constructive account* represents an important common aspect of all interpretive activities which are, in some sense of the word, *creative* even of interpretive activities occurring in the empirical sciences (that is, the interpretation of empirical data from inside theoretical frameworks).³⁸

With regard to value freedom too, as in the case of scientific realism, it is absolutely legitimate to interpret Dworkin's statements in a broad sense, that is, as expressing the more general thesis according to which all scientific language, even in the hard sciences, is "value laden".

4. In this section I will try to show that the dispute between Aarnio and MacCormick on one side, and Dworkin on the other, does no more than reproduce, in a specific context, a more general - and philosophically very relevant - epistemological debate taking place in contemporary metascience on the same crucial issues: realism and value freedom. I think that a little digression into this higher-level discussion will be of some help in order to grasp more adequately not only the epistemological presuppositions of the argumentation theories under scrutiny, but also the more hidden implications of the critical debate being carried on by these legal philosophers.

A) We shall begin with the *scientific realism issue*. Today's metascientific discussion on this subject can be schematically synthesized very broadly by pointing out two different metascientific trends, each one composed of various and not homogeneous positions, which both arise from the deep crisis of neopositivism.³⁹

1. *The first trend* defends scientific realism to the utmost. It embraces different perspectives, among which I would like to mention the *post-Popperian* one⁴⁰ and that which turns around a causal theory of reference.⁴¹ All these

³⁸ Dworkin (1986), pp. 47-53.

³⁹ I speak of neopositivism's crisis and of its implications for legal science in my book: see Villa (1984).

⁴⁰ See, for this kind of perspective, Newton Smith (1981) and Watkins (1984).

⁴¹ This theory is held by, among others, Kripke (1972) and Field (1977), pp. 145 ff.

perspectives outline a - quite sophisticated - empiricist model for the hard sciences, a model which is very similar, roughly speaking, to that implicitly presupposed by Aarnio's and MacCormick's theories of legal reasoning. It is centred upon the basic idea of the "*strong objectivity*" of "genuine" scientific knowledge, a knowledge whose aim is the pursuit of truth as correspondence. 2. *The second trend* consists of a multifaceted cluster of *anti-realist* positions, which more or less strongly oppose scientific realism. The locution 'anti-realism' is, in my opinion, the most proper way of characterizing the contemporary critical movement against realism, a movement which is very different from traditional criticism related with philosophical idealism.⁴² The latter one turns the "realism vs. anti-realism" controversy into all-round philosophical dispute; on the contrary, contemporary anti-realism divides the matter up into many specific issues concerning epistemology and philosophy of language. This multiform movement includes, among others, *contemporary empiricism*, which has turned its back on neopositivism,⁴³ *semantic anti-realism* (according to which the rejection of realism must be expressed through philosophy of language, that is, by bringing into the discussion the concept of truth, at least for some class of statements),⁴⁴ and, last but not least, *constructive post-empiricism*.⁴⁵

I would like to dwell a little upon this last perspective, not only because it is from there that perhaps the most rigorous and powerful criticism against realism comes; but above all because the same term, 'constructivism', is used, and with good reason in my opinion, by MacCormick and Dworkin, in attempting to characterize the proper epistemological model for practical sciences (but Dworkin does more than this).

One of the most important features of post-empiricism's constructivist version is that it radically opposes the thesis that scientific language mirrors (in some sense of the word) an objective reality, which can be approached independently from the theoretical framework adopted in describing it. The

⁴² This locution is used, for instance, by Dummett (1978) and Wright (1987), pp. 2-3, 73, 264.

⁴³ One of the most influential works in this direction is that of van Fraassen (1980).

⁴⁴ Dummett (1978) and Wright (1987), for instance, favour this kind of approach.

⁴⁵ The locution 'constructivism' is used in epistemology in a - more or less - similar sense by Boyd (1984), p. 52, Trigg (1980), p. 5 and McMullin (1984), p. 23.

strong influence of the "later Wittgenstein's" thought is evident here, especially his thesis of language as a "constructive activity".

Constructive post-empiricism does not, of course, seek to deny the existence of an external reality; but, with regard to this, the real problem is that it is impossible, on a constructivist approach, to speak of reality without bringing in an interpretive framework, that is, a specific scheme of description.⁴⁶ Reality in itself is nothing more than an amorphous and undifferentiated chaos⁴⁷ (*reality in a weak sense*).⁴⁸

Theoretical frameworks, or, more generally, research traditions, give a structure and an order to reality, cut up the "flux of experience" into pieces, constructing, with the help of conceptual categories ("primary and secondary qualities", "natural kinds") a world of - common-sense and scientific - objects. According to this approach (and this is, perhaps, the core of the matter), we cannot postulate an external and privileged point of view ("God's-eye point of view"⁴⁹) from which to look dispassionately at "the way the world is", from which, that is, to ascertain if there is a correspondence relationship between theories and "mind-independent things".⁵⁰

It can easily be seen, in this context, that criticism of correspondence theory represents a logical consequence, of a more general character, of this anti-realist approach. And it is a much more radical criticism than that levelled against some specific versions of the theory (against the Tarskian version, for instance). If we wholeheartedly accept that reality, as the reference point of scientific theories, is never "pure" and "mind-independent", but always linguistically interpreted and theoretically reconstructed by the working

⁴⁶ This kind of epistemological conception is shared, in quite different ways, by, among others, Putnam (1981), Goodman (1978), Rescher (1973), Kuhn (1970), and Rorty (1980), (1982).

⁴⁷ See Rescher (1973), pp. 100 ff. for similar considerations.

⁴⁸ Devitt speaks of "weak realism" (Devitt (1984), p. 15) in referring particularly to Goodman's position.

⁴⁹ Here Putnam's distinction between "internal realism" and "metaphysical realism" is very useful; see Putnam (1981), p. 49.

⁵⁰ Fine very well characterizes this kind of realist approach when he says that "the realist, as it were, tries to stand outside the arena watching the ongoing game and then tries to judge from his external point of view what the point is". But - replies Fine in critical terms - "he cannot stand outside the arena, nor can he survey some area off the playing field and mark it out as what the game is about"; see Fine (1984), p. 99.

research tradition, then we cannot help calling it a reality "internal", in some sense of the word, to that tradition. The truth criterion, then, cannot be a *correspondence one*, but necessarily a *coherence one*. The reason is that empirical facts, in their theoretical interpretation, are part of the framework, located as they are at the lowest level of the theoretical system. Thus, the truth test cannot help turning into a *coherence test*, consisting in a check on the "internal fitness" of the propositions which are part of the framework. Here, too, as in argumentation theory, coherence is not interpreted in a strict sense, as *consistency*, but in a much broader sense, as *consonance*, as *hanging together*, of a theoretical framework. In Goodman's words, knowledge is, first of all, "finding a fit"⁵¹ among a system of beliefs.

In this metascientific perspective, the conceptual dichotomy between "truth as the criterion of the empirical sciences and coherence as the criterion of the interpretive sciences", breaks down completely because coherence has a very much broader scope, in the sense that it applies even to empirical disciplines.⁵²

It is easy to see that there is a close resemblance between *constructive post-empiricism*, as a metascientific thesis, and the *constructive model* (in MacCormick's terms), as an epistemological model for legal reasoning. This observation is worth examining further in the next pages.

B) With regard to the value-freedom principle, too, the same kind of opposition between scientific discourses (in a strong sense) and evaluative discourses that we noted at the level of argumentation theory traditionally recurs, at a more general epistemological level. But if we turn our back on this traditional position in favour of a constructivist approach, we can find, on the issue of value judgements too, the same kind of parallelism between constructive post-empiricism and the constructive model as we have already noticed in connection with the scientific-realism issue. In both cases, it is held that the evaluative dimension is a further one which comes into play when the coherence criterion is not sufficient for determining interpretive and theoretical outcomes unequivocally.

We shall not waste much time speaking about value freedom, because it is too big a problem to be dealt with in these few pages. Anyway, there is no doubt that the prevailing opinion, in analytic philosophy of science and

⁵¹ Goodman (1978), p. 21.

⁵² On the role played by coherence in empirical disciplines, see, among others, Goodman (1984), p. 37. Putnam (1980), pp. 50, 54, 73, Hesse (1980), pp. 126 ff., Rescher (1973b).

of ethics, is that centred upon the "great division" between descriptions and prescriptions (in this approach, value judgements are a *species* of the *genus* 'prescriptions'). On this basis, it is easy to argue that "genuine" scientific language is the real, "pure", descriptive language, from which, therefore, every evaluative contamination must be excluded.

It is important to notice, however, that this traditional point of view is today being forcefully attacked, at least in its more extreme positions, by post-empiricist metascience. There seem to be three major arguments against the value-freedom principle, in its strong sense.

1. The first line of attack moves on constructivist epistemological premises. As we have shown, in this perspective, scientific theories are conceived of as *holistic structures*, providing complex interpretations of a given section of reality, interpretations which end up as world views. At the top of the framework lie, among other things, *background theories* which express the *ontology* of the research tradition in question, the state of things postulated by the theory. At this high level, value judgements cohabit with theoretical statements mixed up with them. These can be termed *appraising value judgements*,⁵³ which, among other things, express preferences in favour of the states of things postulated by the theory.⁵⁴ Such judgements, together with the theoretical components, very deeply influence the processes of perception, interpretation and selection of empirical data. But the most important thing is that, from a holistic point of view, it is impossible (and anyway by no means fruitful) to insulate the evaluative component from the whole theoretical framework, in order to eject it. Those who maintain the opposite thesis are misled by the acceptance of a naive kind of realism, which mixes together traditional "descriptivism" and the *non-cognitivist thesis* on values.⁵⁵

2. The second line of attack, which often goes together with the first one, is connected with the *under-determination thesis*. Here value judgements are no longer those located at the top of the theoretical system, but, rather, those which come to play at the level of the second-order criteria (the first-order

⁵³ On the concept of 'appraising value judgements' (and on the difference between it and that of 'characterizing value judgements'), see, for instance, Nagel (1961), pp. 492 ff and Zolo (1986), p. 175.

⁵⁴ In a similar vein are the theses held by Hesse (1980), pp. 188-189 and Thomas (1979), p. 118.

⁵⁵ This connection between "descriptivism" and "non-cognitivism" is very vividly made by McDowell (1981), p. 141.

criterion being coherence) of theory choice, above all in the - frequent - situations in which there are several competing and empirically equivalent alternatives. But 'empirically equivalent' means, according to a constructivist code of translation, 'equally coherent'. The problem, here, is to find second-order criteria (for instance, simplicity, elegance, explanatory power, etc., as relevant features of "good theories") through whose help scientists could find the "best theory" (not in absolute terms, but only in that context of choice). It is in just this dimension of scientific activity that we again meet value judgements: they come in either *directly*, that is as appraising judgements (in the sense suggested above which direct the theory choice in the absence of stronger constraints;⁵⁶ or *indirectly*, that is as evaluations constructing a hierarchical order (order of preference) of second-level criteria in the event of conflict arising among them.⁵⁷

3. The third line of attack concerns only the problem arising when the object of scientific description is a *social practice* (for instance, law, science, scientific method, social customs, etc.). In situations like these, as has been very forcefully noticed in metascience and in methodology,⁵⁸ a proper description of practice cannot even begin without presupposing a normative framework able, among other things, to orient the selection of relevant data and settle conflicts arising at "observational" level. The aim of this preliminary definitional work is to clarify, first of all, what is to be meant, in the course of analysis, by "genuine science", "genuine scientific method"... etc.⁵⁹ Without this kind of evaluative assumption the description will completely lack explanatory power. All this shows, incidentally, that the "pure" descriptive methodology cherished by many analytical philosophers is mere "wishful thinking".

The image of *value-laden scientific activity* lying in the background of this threefold criticism is quite similar, at least in the reconstruction of the

⁵⁶ See, for this kind of suggestion, Hesse (1980), pp. 133 ff., 188 ff., 193 ff., and Thomas (1979), pp. 126-127.

⁵⁷ Kuhn often makes reference to value judgements as tools for solving conflicts among competing criteria of theory choice; see particularly Kuhn (1977), pp. 321 ff.

⁵⁸ See, for the proper quotations, the first chapter of my book: Villa (1984).

⁵⁹ I think that the most convenient way of labelling concepts as "science", "scientific method", "law", etc. is that chosen by Gallie (1956), pp. 167-168, who calls them "*essentially contested concepts*", that is concepts whose definitions unavoidably contain *appraisive terms* (terms which imply a positive evaluation of the object's definition).

role played by values, to the image of *value-laden legal and ethical reasoning* presented by Aarnio, MacCormick and Dworkin. In legal reasoning too:

- 1) values enter into the holistic justificatory theories which form the basis of legal argumentation;⁶⁰
- 2) values direct interpretive choices at the level of second-order criteria (when coherence is not sufficient);
- 3) values constitute a necessary condition for the description of legal practice (but only according to Dworkin's theory).

5. In this last section I would like to display, more clearly than before, some close resemblances between *constructive post-empiricism* and the *constructive model*, and to draw, in the meantime, some further implications. We have already analyzed the common points of contact between the two forms of constructivism: the "internal" relation between value-laden theories and facts, the rejection of a "God's eye view", the infra-theoretical coherence as the general criterion of truth, the frequent intervention of value judgements in decisional processes, etc.

The real novelty of the situation described is that, at least from the point of view of a constructivist theory of science, we find the natural sciences coming closer (at the methodological level, of course) to the practical and hermeneutic sciences, and not *vice-versa*, as is commonly suggested by traditional epistemological conceptions. It is not at all by chance, therefore, that, as I tried to show in a previous work of mine,⁶¹ post-empiricist philosophers of science look at argumentative and decisional processes occurring in law as a model for grasping, more clearly than before, *similar* - at least so they seem to be to post-empiricist philosophers - *processes* (for instance, those of theory choice among competing alternatives) occurring in the empirical sciences. The fact is that, according to this metascientific perspective, the great dichotomies postulated by empiricism, such as "theoretical science vs. practical science", "truth vs. coherence", "verification vs. justification", etc. begin to break down, with the result that theory choice procedures are interpreted in a more and more similar way to practical deliberations.⁶²

⁶⁰ This is clearly MacCormick's opinion: see MacCormick (1982), p. 130.

⁶¹ See the last chapter of my book (*op. cit.*, notes 11 and 32).

⁶² Bernstein ((1983), pp. 40 ff.), too, makes similar remarks about the way in which post-empiricist metascience looks at the relationship between theoretical and practical sciences: according to Bernstein who makes particular reference to Kuhn's work, practical philosophy becomes a model for philosophy of science.

This unitary approach to science, charitable towards "weak" cognitive disciplines, will of course be rejected by those who stick to an empiricist conception of hard sciences. This is the case, in my opinion, of Aarnio's and MacCormick's theories. The constructive model, on their interpretation, functions only in the practical sciences. Dworkin's point of view is, if my interpretation of his work is correct, radically different. Even if his epistemological perspective is by no means clear, I think that at least one basic conviction can certainly be ascribed to him: namely, that which assigns to the concept of *constructive interpretation* a general epistemological scope, which goes well beyond the sphere of the practical sciences.

I have said before that legal philosophers have wrongly neglected these epistemological divergences. Many analytic legal philosophers have tried to interpret and criticize Dworkin using their epistemological categories, ignoring the fact that Dworkin's categories are absolutely different. This attitude has provoked serious misunderstandings, particularly regarding the interpretation of the right-answer thesis. Aarnio and MacCormick fall into the same mistake. Their criticism of the right-answer thesis flickers, quite unsatisfactorily, between two opposed attitudes.

a) The first would label Dworkin as a *legal naturalist*, surely better equipped than his forerunners in epistemological matters: a legal naturalist, in short, who has learnt the Popperian lesson.⁶³

On this kind of interpretation, the right-answer thesis could be justified only by presupposing the existence of a sort of Popperian "world 3" - in this case a world of norms and values - , which could play the role of an objective parameter of truth for legal theories. Unfortunately, this interpretation has been many times denied, with good reasons indeed, by Dworkin himself. Dworkin tries in many places to make it clear that his proposition is completely different from a legal naturalist one.⁶⁴

b) The second attitude takes Dworkin's refusal of legal naturalism seriously, and acknowledges his adoption of a constructivist model.⁶⁵ But this is the reason why, according to this critical attitude, *Dworkin is incoherent*. You

⁶³ This critical attitude is clearly exhibited by, for instance, Aarnio (1981), p. 41 and Guastini (1985), p. 167.

⁶⁴ See particularly Part Two of Dworkin (1985), in which he explicitly takes sides against this interpretation of his work.

⁶⁵ See MacCormick (1982), pp. 126 ff.

cannot have both, they say: that is, constructivism and right answer *together*. Constructivism, rightly understood, denies the existence of a neutral and independent (of available theories) world of objective facts, with whose help it is easy to judge whether one theory is better than another.⁶⁶

This interpretation, too, is vitiated by a serious misunderstanding: that Dworkin's position is filtered through empiricist spectacles, as if the empiricist model were the only available one for a proper account of science. According to an empiricist model, surely, we can have a right answer only if we can objectively check this outcome against hard facts coming from an independent reality (even a Popperian "world 3" could do the job). Dworkin, of course, does not agree with his critics. He sharply separates the right-answer thesis from any reference to a correspondence criterion of truth. The finding of the right answer is a matter "internal" to the argumentative practice, which somehow "makes up" the law. Finding the right answer means, in the last analysis, discovering the best available theory of law, standing inside legal practice and attempting to interpret it "in the best light".⁶⁷ It is not always a viable road; and anyway we will never, at one stage or another of the process of justification, come into "direct touch" with reality. Dworkin certainly thinks he has at his disposal a theory (*law as integrity*) which is surely better than others; but, speaking in the abstract, I think it is legitimate to hold that Dworkin's theory could manage to explain a situation in which there is *more than one right answer* in the sense that each of these alternatives can be qualified as "correct" by a normative theory which is not excluded from a sort of theoretical competition in which *it is impossible*, at a given moment, *to find the best theory*.⁶⁸

Dworkin's critics dig a deep ditch between the world of hard sciences, ruled by the key ideas of objectivity and truth, and the world of practical sciences, where the unavoidably subjective choices required leave a big space for arbitrariness. The lack of objectivity (in a strong sense) necessarily implies the presence of subjectivity and arbitrariness. But the rejection, even for the hard sciences, of the postulate of "strong objectivity" and of the truth-as-cor-

⁶⁶ *Ibidem*, p. 130.

⁶⁷ Dworkin (1986), pp. 13, 51.

⁶⁸ For a recent example of an epistemological perspective in which "warranted assertability" replaces "truth as correspondence" as a general criterion for cognitive claims, see Wright (1987), p. 37. This privileged position accorded to warranted assertability is, in Kripke's opinion (Kripke (1982), pp. 74 ff.), one of the most significant outcomes of Wittgenstein's later work.

respondence criterion radically changes this situation. The concept of *warranted assertability* substitutes correspondence as a general criterion of truth for all kinds of statements implying cognitive claims. The former does not have any substantive features, like the correspondence criterion (at least in the realist version). This means that the warranted-assertability criterion does not fix *in advance*, independently of a context of application, the specific working conditions of assertability.

With the fall of the postulate of objectivity, all justificatory practices, even in the empirical sciences, express themselves in linguistic interactions and argumentative disputes inside a given community. The problem, then, becomes that of ascertaining which are the specific justificatory criteria (sometimes conflicting with each other) at work in a particular disciplinary context, and, more specifically, inside a given community (of judges, of scientists, etc.), which secure the consensus of the audience. Anyway, all this cannot make the need for a general theory of justification, which takes into account the common (also epistemological) aspects of justificatory practices, disappear. This general theory will by no means refer only to the practical sciences, but will constitute the common conceptual basis for both empirical and practical sciences.

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